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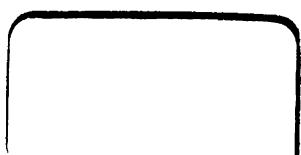
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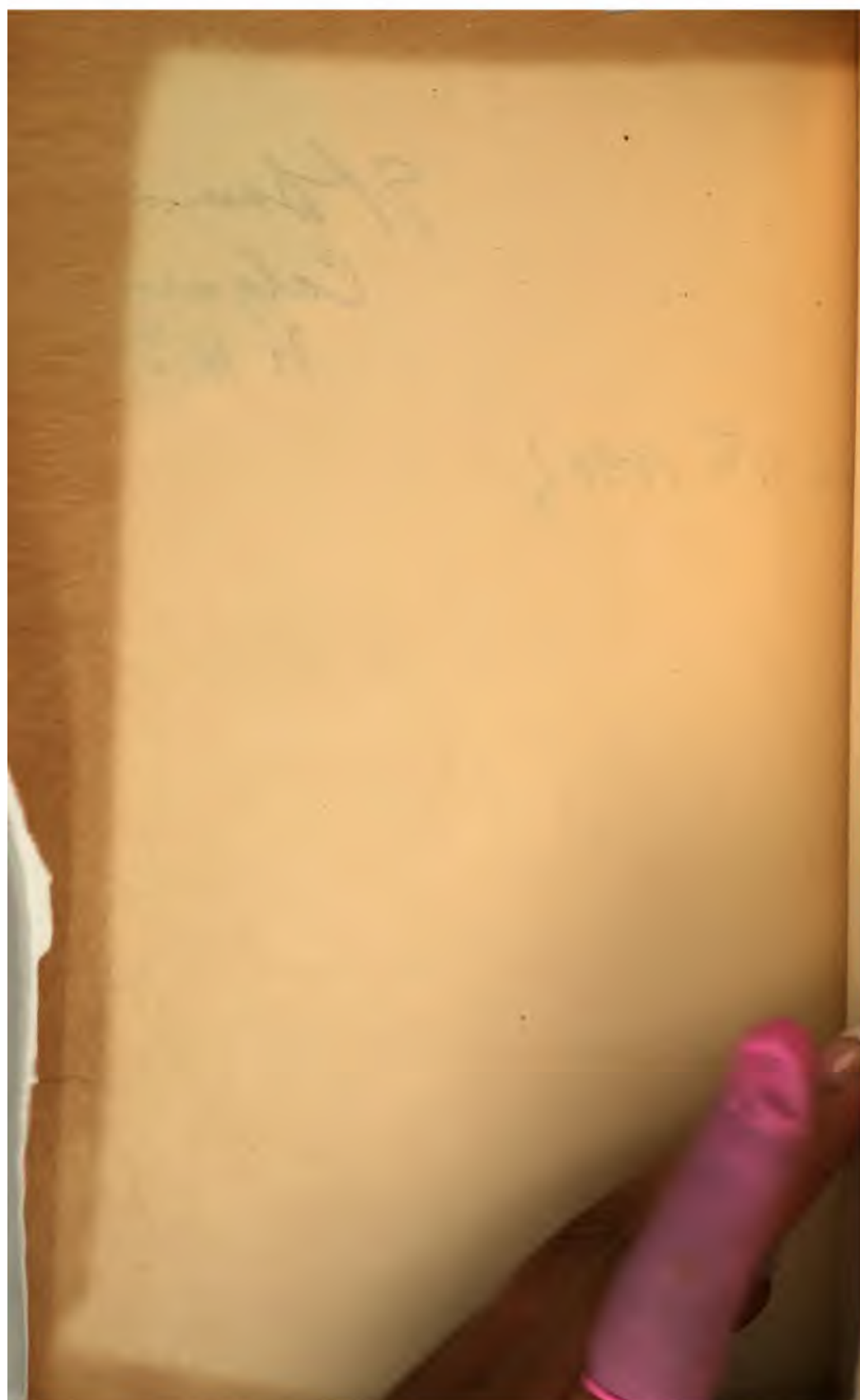


J. P. Davis
Calgary
H. W. T.

July 8th 1890 }



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A TREATISE
ON THE
LAW OF MORTGAGES
OF
REAL PROPERTY.

BY
LEONARD A. JONES,
AUTHOR ALSO OF TREATISES ON "RAILROAD SECURITIES"
AND "CHATTEL MORTGAGES."

IN TWO VOLUMES.
VOL. I.

THIRD EDITION.

BOSTON:
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TO THE HONORABLE
GEORGE TYLER BIGELOW, LL D.,
FORMERLY
CHIEF JUSTICE OF MASSACHUSETTS,
IN TESTIMONY OF THE HIGH REGARD IN WHICH HIS SERVICES
ON THE BENCH ARE HELD,

This Treatise is Inscribed

BY THE AUTHOR

PREFACE TO THE THIRD EDITION.

THE present revision of this work includes the decisions upon the topics treated of which have been reported since the preparation of the Second Edition down to the beginning of the current year. The statements made in the Preface of that Edition might be repeated in the present, with only slight modifications: the chief of which is, that the number of new cases in this edition is greater than the number in that, — the number now added being about fifteen hundred, and the additional citations about twenty-five hundred. New matter has been incorporated into the text of every chapter; and again, the chapter treating of the assumption of mortgages has received the largest proportion of such additions, — about a fourth part of it being new matter, in which the result of many important decisions are stated.

Much labor has been given to the preparation of each new edition of this work, with the view of making it in every way more complete and useful; and perhaps it is in this manner that I can best show my appreciation of the kind reception the profession has given it.

L. A. J.

BOSTON, *February 7, 1882.*

FROM THE PREFACE TO THE SECOND EDITION.

ADDITIONS to the text, or additional citations of cases in the notes, have been made in every important division of the subject, — the new matter added making about a hundred and fifty pages, the additional citations numbering about eighteen hundred, and the new cases being more than a thousand. By condensing the text, and by omitting some matters of secondary importance from the notes, the size of the volumes has not been greatly increased. The new matter has been, for the most part, incorporated with the body of the work, the arrangement and division of the subject originally adopted having been found to be such that very few new sections have been required, — these being mostly devoted to the statute law of States or Territories which have recently enacted statutes affecting mortgages. Among the chapters greatly enlarged by embodying new decisions with the text may be mentioned that treating of the liability of purchasers who have assumed the payment of mortgages.

Boston, *July 4, 1879.*

FROM THE PREFACE TO THE FIRST EDITION.

THE Law of Mortgages is a subject which cannot be treated altogether with reference to general principles. At the present time two opposite theories of the nature of a mortgage hold about equal sway in this country, and this difference of view, at the foundation of the subject, has naturally led to many divergences in the details of it. It is a subject, too, which legislation, directly and indirectly, largely controls. All that part of it which relates to remedies is closely connected with the systems of Civil Procedure in the several States, which are quite dissimilar. The author has endeavored to follow a natural order of arrangement in this treatise; and while presenting not merely the common law of the subject, but as well the modifications of that law made through statutory enactments and judicial decisions, in order to avoid confusion of statement, and to enable one who consults the book to turn with as little trouble as possible to the statement of the law upon any part of the subject for any State in the Union, he has stated in detail for each State the law upon some of the more important divisions of the subject, in which there is a want of harmony. In this way, at the same time, a fuller presentation of the law and of the authorities upon these topics has been made than would otherwise have been practicable.

Boston, *February 7, 1878.*

FROM THE PREFACE TO RAILROAD SECURITIES.

IN writing my Treatise on the Law of Mortgages of Real Property, I at first intended to follow out the application of the general law of the subject to mortgages made by railroad companies and similar corporations; but I found that any treatment I could give these special topics within the limits of that work would, from its brevity, be wholly unsatisfactory. This fact, together with the consideration that nearly all the adjudications upon corporate mortgages relate to matters mostly foreign to the general Law of Mortgages, led me to omit these matters from my work upon the general subject. The volume upon Railroad Securities is intended to make good that omission. In that it ~~was~~ my purpose not to include subjects elementary or general in the Law of Mortgages. The public nature of railroad and other like corporations having public duties to perform, in return for the franchises granted them, and the nature and extent of their property, have introduced into mortgages of their franchises and property new elements of law which have now developed into a separate branch of jurisprudence. A glance at the Table of Contents of that volume will show how widely the topics considered differ from those which

FROM THE PREFACE TO RAILROAD SECURITIES.

arise under ordinary mortgages ; and even when the titles are the same, an examination of the treatise will generally show that, as applied to these corporate securities, the substance of the law is different.

Boston, *February 7*, 1879.

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| Young Co. Sav. Bank v. Roberts | 943 | Zingsem v. Kidd | 1464 |
| Youngman v. Elmira & Williams- port R. R. Co. | 48, 452, 667, 1773 | Zollman v. Moore | 1654 |
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THE LAW OF MORTGAGES OF REAL PROPERTY.

CHAPTER I.

THE NATURE OF A MORTGAGE.

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| I. History of the development of the law, 1-16. | II. The nature of a mortgage in the dif- ferent states, 17-59. |
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1. *History of the Development of the Law.*

1. **Mortgages used by the Anglo-Saxons.**—Mortgages, or at least pledges of land in the nature of mortgages, were not unknown to the Anglo-Saxons in England. In at least two ancient charters the transactions are clearly enough defined to show that land was given as security for the payment of money, though, as to the manner and form of the transfer, and the rights of the parties under it, very little can be made out. The most important of these cases is quoted below.¹ It appears from this that the

¹ The translation is taken from a collection of essays of much interest recently published (1876), entitled *Essays in Anglo-Saxon Law*, Appendix, Case No. 18, p. 342. See, also, the *Essay on Anglo-Saxon Land Law*, p. 106. As a coincidence it may be mentioned that the present chapter with the following quotation had been written before the same charter had appeared as illustrating Anglo-Saxon mortgages in the third edition of Mr. Fisher's excellent treatise on *Mortgages*. It is to be observed that Eadgifu mentioned in this document was queen of Edward the Elder, whose reign was from A. D. 901 to 925.

"Eadgifu makes known to the archbishop and the community of Christ's Church how her land at Cooling came [to

her]; that is, that her father left her land and charter as he rightfully got, and his parents left them to him. It happened that her father borrowed thirty pounds of Goda, and assigned him the land in pledge for the money, and he held it seven years. Then it happened about that time that all Kentish men were summoned to Holme on military service; so Sighelm, her father, was unwilling to go to the war with any man's money unpaid, and gave thirty pounds to Goda, and bequeathed his land to Eadgifu, his daughter, and gave her the charter. When he had fallen in war, then Goda denied the return of the money, and refused to give up the land till some time in the sixth year. Then [her kinsman] Byrnsige Dyrincg firmly pressed her claim, until the Witan, who then were, ad-

mortgagee was in the possession of the land, and that he doubtless had the use of the land in return for the use of the money loaned by him. Upon the payment of the loan it was his duty to render back the land to the mortgagor, and his failure to do so in this case was the occasion of litigation, commencing in the reign of Edward the Elder, extending through the reigns of Æthelstan, Edmund, Eldred, and Edwy, and finally ending in the reign of Edgar. The tribunal was the Witan or national assembly, which was also the highest court of law in the kingdom.

From another charter in which reference is made to a mortgage, it seems that the title to the mortgaged land, at some time and in some way not revealed, became vested absolutely in the mortgagee, who conveyed away the land. Slight as the knowledge is which these charters give us in respect to the law of the Anglo-Saxon mortgage of real property, it is of interest; for

judged to Eadgifu that she should cleanse her father's hand by [an oath of] as much value [namely, thirty pounds]. And she took oath to this effect at Aylesford, on the witness of all the people, and there cleansed her father in regard to the return of the money, with an oath of thirty pounds. Even then she was not allowed to enjoy the land until her friends obtained of King Edward that he forbade him [Goda] the land, if he wished to enjoy any [that he held from the king]; and he so let it go. Then it happened, in course of time, that the king brought so serious charges against Goda, that he was adjudged to lose charters and land, all that he held [from the king, and his life to be in the king's hands]. The king then gave him and all his property, charters, and lands to Eadgifu, to dispose of as she would. Then said she that she durst not, for [fear of] God, make such a return to him as he had merited from her, and gave up to him all his lands except two hides at Osterland, but would not give up the charters before she knew how truly he would hold them in regard to the lands. Then King Edward died, and Æthelstan took the throne. When it seemed to Goda reasonable, he went to King Æthelstan, and prayed him to intercede with Eadgifu for the return of his charters; and the

king then did so, and she returned him all except the charter of Osterland; and he relinquished the charter voluntarily to her, and thanked her with humility for the others. And, further, he, with eleven others, gave an oath to her, for born and unborn, that the matter in dispute was forever settled; and this was done in the witness of King Æthelstan and his Witan, at Hamme, near Lewes. And Eadgifu held the land, with the charters, during the days of the two kings, her sons [Æthelstan and Eadmund]. Then Eadred died, and Eadgifu was deprived of all her property; and two sons of Goda (Leofstan and Leofric) took from Eadgifu the two before-mentioned lands at Cooling and Osterland, and said to the child Edwy, who was then chosen king, that they were more rightly theirs than hers. This then remained so, till Edgar obtained power; and he and his Witan adjudged that they had been guilty of wicked spoliation, and they adjudged and restored to her her property. Then, by the king's leave and witness, and that of all his bishops [and chief men], Eadgifu took the charters, and made a gift of the land to Christ's Church, [and] with her own hands laid them upon the altar, as the property of the community forever."

while we find the elements of our present system of the law of real property in the customary laws of the period preceding the Norman Conquest, we may well expect to find in this source as well the beginnings of the law of mortgage as a part of that system.

2. *Vivum vadium*. — At a later period, as is apparent from the Domesday, pledges of land were frequent. Later still, in the time of Glanville, pledges of land had taken two distinct forms, the *vivum vadium* and the *mortuum vadium*. The former denoted a pledge of land when the creditor took possession of the land under the conveyance, and held it for a certain period, during which the rents and profits received by him went towards the payment of the debt. Upon payment of the debt the debtor was entitled to have his lands back again, and might recover them by suit if not voluntarily restored. This was apparently the form of the mortgage referred to in the Anglo-Saxon charter of the tenth century already quoted; and the mortgages mentioned in Domesday seem to imply that possession of the property was in the mortgagee; and also, in the time of Glanville, the possession seems usually to have followed the security.

3. This form of mortgage is like the Welsh mortgage of a later period, in so far that it contains no condition that the conveyance is to be void upon payment of the debt, as is the case with the common mortgage, but the mortgagee had the possession of the property assured to him, and received the rents and profits either in lieu of interest, or in discharge of both principal and interest. Under this form of mortgage the mortgagee had no remedy whatever. He could not sue for the debt. There was no covenant for payment, either express or implied.¹ He could neither compel the mortgagor to redeem nor cut off his right of redemption by foreclosure. In this respect the transaction was like a conditional sale. The mortgagor could redeem at his option; and could enforce his right either at law or in equity. After full payment of the debt from the rents and profits, the mortgagor's right to redeem would be barred, finally, by the lapse of the statutory period of limitation. This form of security is the same as one form of the Welsh mortgage, or of a mortgage in the nature of a Welsh mortgage, where the property is conveyed to the mortgagee and his heirs, to hold until out of the rents and profits he shall have received both principal and inter-

¹ *Howel v. Price*, 1 P. Wms. 291; *Lonquet v. Scawen*, 1 Ves. Sen. 402.

est.¹ The principal distinction between the ancient *vivum vadium* and the modern Welsh mortgage seems to be that, while in the former the rents were applied in satisfaction of the principal, in the latter they were received in satisfaction of the interest, the principal generally remaining undisturbed.

4. The *mortuum vadium* was the designation of a pledge of land of which the mortgagee did not necessarily receive the possession, or have the rents and profits in reduction of the demand. In the time of Glanville this form of security was looked upon with much disfavor as a species of usury. That the creditor was liable to the penalties of usury if he received money for the use of the loan, and was considered dishonest as well, is a sufficient reason why this kind of security, though not prohibited, was then seldom used. The *mortuum vadium* spoken of by Littleton is the common law mortgage. It had then become a conditional estate; the condition being that upon payment of the debt at a fixed time the grantor might reënter, but upon breach of the condition the conveyance became absolute.² It was at a later day that the equitable right of redemption after forfeiture became an incident of the mortgage. The nature of the transaction as a mere security for a debt was not then regarded, but the rules applicable to other estates upon condition were enforced with all their strictness. This is illustrated in the statement of Littleton, that if the condition was that the debtor should pay a certain sum of money to the mortgagee, no definite time being fixed for the payment, if the debtor died before making payment, a tender of payment by his heir was void, because the time within which the payment should be made was past, the condition that the debtor should pay being as much as to say that he should pay during his lifetime. But if the condition was that the payment should be made by a day certain, then if the debtor died before that day, his heir or

¹ Coote on Mortg. 208; Rankert v. Clow, 16 Tex. 9; Angier v. Masterson, 6 Cal. 61.

² Littleton's Tenures, lib. iii. c. 5, § 332. "*(Of Estates upon Condition.)* Item: If a feoffment be made upon such condition that if the feoffor pays to the feoffee, at a certain day, forty pounds of money, that then the feoffor may reënter; in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mort-*

gage, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not; and, if he doth not pay, then the land which is put in pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition. And if he doth pay the money, then the pledge is dead as to the tenant."

executor might, as his representative, tender the money within the time limited.¹

5. Such restraints upon the free alienation of lands were imposed after the Norman Conquest under the feudal system then established that it is probable that mortgages were almost unknown in England for the next two hundred years.² At length the statute of *Quia Emptores*³ restored freedom of alienation to all except the immediate tenants of the crown, and not long afterwards questions relating to the nature of mortgages and the respective rights of the parties began to receive the attention of the courts and of parliament.

6. Growth of the doctrine of an equity of redemption. — In the latter part of the reign of Elizabeth it seems to have been an unsettled question whether an absolute forfeiture of the estate had not been incurred by a non-payment of the debt at the day named in the condition.⁴ But the right of the mortgagor to redeem after forfeiture seems to have been a recognized right in

¹ Litt. Tenures, lib. iii. c. 5, § 337. "Also, if a feoffment be made upon condition that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter; in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, this is as much to say as if the feoffor during his life pay the money to the feoffee; and when the feoffor dieth then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day; then may the heir tender the money as is aforesaid, for that the time of the tender was not past by the death of the feoffor. Also it seemeth that in such case, where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter. And the reason is, for that the executors represent the person of their testator." Followed in *Alsop v. Hall*, 1 Root (Conn.), 346.

² Coote on Mortg. 5. "In the twen-

tieth year of William's reign, and on the completion of Domesday Book, he summoned a meeting of all the principal landholders in London and Salisbury, and accepted from them a surrender of their lands, and re-granted them on performance of homage and the oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, and it was held the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seigniority without his tenant's consent, although the tenants, even of the crown, it would seem, might grant subinfeudations (*i. e.* to hold of themselves) without license. It was further held, the tenant could not subject his lands to his debts by execution of law, for, if he could, he might have effected that circuitously which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he aliene them without the consent of the next collateral heir."

³ 18 Edw. I. (A. D. 1325).

⁴ Goodall's case, 5 Rep. 96; Wade's case, 1b. 115.

the reign of Charles I.;¹ although at the close of the reign of Charles II. an equity of redemption was declared to be a mere *right* to recover the estate in equity after breach of the condition, and not such an estate as was entailable within the statute *de donis*.² In this case Chief Justice Hale made the often quoted remark, "By the growth of equity on equity, the heart of the common law is eaten out, and legal settlements are destroyed." He thought the mortgagor's equity of redemption had already been carried too far, saying, "In 14 Richard II. the parliament would not admit of redemption; but now there is another settled course; as far as the line is given, man will go; and if an hundred years are given, man will go so far, and we know not whither we shall go. An equity of redemption is transferable from one to another now, and yet at common law, if he that had the equity made a feoffment or levied a fine, he had extinguished his equity in law; and it hath gone far enough already, and we will go no further than precedents in the matter of equity of redemption, which hath too much favor already."

Even so late as 1737 it was strenuously argued before the high court of chancery,³ that an equity of redemption was not an estate in land of which a husband was entitled to be a tenant by the curtesy. It was insisted that the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage; it was compared to the case of a proviso for a reëntry in a conveyance when no entry had ever been made, and to a condition broken when no advantage had ever been taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action, or of suit in a court of equity, in order that the estate might be reconveyed to her upon complying with the terms in the mortgage. But Lord Hardwicke declared that an equity of redemption is an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a

¹ Emanuel College v. Evans, 1 Rep. in Ch. 18. In this case, although the money was not paid at the day but afterwards, it was held that the mortgage term ought to be void, just as it would have been at

law on a payment according to the condition.

² Roscarrick v. Barton, 1 Ca. in Ch. 217.

³ Casborne v. Scarfe, 1 Atk. 603.

mere right only, but such an estate whereof there may be a seisin; the person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

7. When the doctrine was first established. — Courts of equity had become fully established in their authority in the reign of James I., and although many equitable principles now recognized in the doctrine of mortgages were not fully established till long afterwards, it is probable that at this time the subject of mortgages was so far within their jurisdiction as to enable them to relieve the mortgagor from the forfeiture of his rights through failure to pay according to the condition, and to establish the doctrine of the equity of redemption.¹ “No sooner, however, was this equitable principle established than the cupidity of creditors induced them to attempt its invasion, and it was a bold but necessary decision of equity, that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from his right to redeem; for in every other instance probably the rule of law, *Modus et conventio vincunt legem*, is allowed to prevail. In truth it required all the firmness and wisdom of the eminent judges who successively presided in the courts of equity to prevent this equitable jurisdiction being nullified by the artifice of the parties.”² Accordingly, “Once a mortgage always a mortgage,”³ became one of the most important maxims in this branch of the law; and a strict adherence to it has at all times been enforced. The parties have not been allowed to provide that the deed creating the mortgage shall at any time, or upon the happening of any event, cease to be a mortgage, and become an absolute conveyance.⁴ Any agreement or stipulation cutting off the right of redemption has always been held to be utterly void.⁵ Even a subsequent release of this right by the mortgagor has always been looked upon with suspicion, and sustained only when made for a proper consideration and without oppression on the part of the mortgagee.⁶

8. The different views of the nature of a mortgage at law and in equity. — A mortgage being a qualified conveyance of

¹ Coote on Mortg. 21.

⁴ Coote, 22; 2 Story Eq. Jur. § 1019.

² Coote on Mortg. 21; and see Price v. Perrie, 2 Freem. 258; Willett v. Winnell, 1 Vern. 488; Bowen v. Edwards, 1 Rep. in Ch. 222.

⁵ See §§ 1038-1046; also, Quartermous v. Kennedy, 29 Ark. 544; Lee v. Evans, 8 Cal. 424.

⁶ Pritchard v. Elton, 38 Conn. 434.

³ Newcomb v. Bonham, 1 Vern. 7

property, whereby the owner parts with it so far as to make it a security to his creditor, and his creditor holds it in such a way that the owner may, by equitably fulfilling his obligation, have his own again, the question, what are the respective rights and titles of each, is one that lies at the foundation of the law upon this subject. Originally an estate upon condition at law, equity assumed jurisdiction to relieve the mortgagor against an absolute forfeiture upon his default in performing the condition subsequent; and for two hundred years and more a mortgage has been one thing at law and quite another thing in equity, although the equitable view of the subject has largely encroached upon, and sometimes quite superseded, the legal, even in courts of law.¹

Courts of equity could not alter the legal effect of the forfeiture which followed a breach of the condition, and did not attempt to do so; but they regarded it as in the nature of a penalty which ought to be relieved against. They recognized the purpose of the mortgage as merely a pledge to secure a debt, and declared it unreasonable that the mortgagee should, by the failure of the debtor to meet his obligation at the day appointed, be entitled to keep as his own what was intended as a pledge.² At law the legal right of the mortgagor to have his estate again was forfeited; but in equity he was allowed still to reclaim it upon payment of his debt with interest. This is the equity of redemption. From the combined influence of these rules of law and principles of equity has come the present law of mortgages.

The equitable view of a mortgage, as merely a security for the payment of a debt or the performance of some duty, is that which is at the present day so constantly presented, both in theory and practice, that it is difficult to realize that the rules of the common law in respect to it remain for the most part unaltered; that the transaction is still a conveyance conditional upon the non-payment of the debt on a day certain, and that upon a

¹ "The case of mortgages," says Chancellor Kent, "is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent's Com. 138. "It is difficult to conceive," says Mr. Coote, "had the courts of the law been so inclined (which it does seem they were), on what principle they

could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy, short of an actual legislative enactment, without disturbing the settled landmarks of property." Coote on Mortg. 17.

² Coote on Mortg. 19.

breach of the condition the mortgagor at law is without right or remedy. The whole legal estate upon the default passes irrevocably to the mortgagee. But at this point a court of equity allows and enforces the right of redemption; and the jurisdiction of courts of equity to give this remedy is fully recognized in courts of law.

9. In courts of law the rigor of the doctrine, in respect to the conditional character of the mortgage, was not at all abated in England until the enactment of the statute of 7 Geo. II. c. 20,¹ which permitted a mortgagor, when an action was brought on the bond, or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or, in case of a refusal to accept the same, to bring such money into court where such action was pending, and the moneys so paid or brought into court were declared to be a satisfaction and discharge of the mortgage, and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or reconvey the mortgaged premises to the mortgagor, or to such other person as he should for that purpose nominate and appoint. "In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction, to enforce redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a reconveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a reconveyance on equitable terms."²

This statute is strictly construed, and is not applicable in any case in which the mortgagor is himself the actor. It is applicable only in the cases mentioned in the preamble and introductory words of the statute, and was not intended to supplant bills for redemption which afford a more complete remedy.³

10. The respective claims of mortgagor and mortgagee in courts of common law and of equity afford a notable instance of

¹ Reenacted in New Jersey, December 3, 1794, Nix. Dig. (4th ed.) 608. See, also, Virginia Code (1873), c. 131, § 21; Davis v. Teays, 3 Gratt. (Va.) 283; Connecticut Gen. Sta. (1875) p. 471.

² Per Mr. Justice Depue, in *Shields v. Lozear*, 34 N. J. L. 496.

³ *Good-title v. No-title*, 11 Moore, 491; *Hurst v. Clifton*, 4 Ad. & E. 809; *Shields v. Lozear*, 34 N. J. L. 496.

the rise of a trust through the mere existence of another legal relationship.¹ "In a court of common law, a mortgage is an ordinary conveyance following upon a contract for a sale or for a lease. The mortgagee takes the place of the mortgagor as owner of the land, and the mortgagor that of the mortgagee as owner of the money borrowed, the subsequent repayment of the money and reconveyance of the land being regulated by what is in fact nothing else than a subsidiary contract. In a court of equity, the mortgagee is recognized as having nothing more than the sort of security for his debt which is provided by a conditional power of sale, and, whether he be in possession of the land or not, is treated as the mere trustee of the land for the benefit of the mortgagor and his heir. The money lent descends, on the death of either of the parties, as a debt due from the one, or his executors, to the other, or his executors."

11. **The modern common law doctrine of mortgages.** — At common law the legal estate vested in the mortgagee and was forfeited upon default. Equity established the right of redemption after default. From these principles is derived the doctrine of mortgages as it exists at the present day, in England and in a large part of our own country. The legal title passes to the mortgagee by the deed, but the mortgagor has after default a right to redeem, which he may enforce in equity. A mortgage is one thing at law and another in equity; in the one court it is an estate, and in the other a security only. The mortgagee has certain legal remedies and the mortgagor certain equitable remedies. These have been so adjusted that a perfectly defined system is the result. Courts of law and courts of equity mutually recognize the jurisdiction of each other over this subject. Courts of law have so far adopted the principles of equity that they allow the legal title of the holder of the mortgage to be used only for the purpose of securing his equitable rights under it. Courts of equity allow the mortgagee, for the purpose of protecting and enforcing his lien against the mortgagor, the remedies of an owner; he may enter into and hold possession, and take the rents and profits in payment of his mortgage debt, and may have his action of ejectment to recover such possession, and hence is sometimes called the owner.² The mortgagee has something more than a mere lien; he has a transfer of the property itself and a

¹ Mr. Sheldon Ames, in his *Science of Jurisprudence*, p. 269.

² *Clark v. Reayburn*, 1 Kans. 281.

legal estate in it, giving him a standing at law as well as in equity.¹ His interest can be called a lien only in a loose and general sense, in contradistinction to an absolute and indefeasible estate.²

In equity a mortgage of land is regarded as a mere security for a debt or obligation, which is considered as the principal thing, and the mortgage only as the accessory.³ The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security; but for other purposes the mortgage is a mere security for the debt.⁴

A recital in a mortgage that the note secured is collateral to the mortgage does not change the character of the instruments or their relation to each other under the general rule as to principal and incident; and the fact that the note is indorsed by a third person makes no difference.⁵

As to all persons except the mortgagee and those claiming under him, it is everywhere the established modern doctrine that a mortgagor in possession is at law, both before and after breach of the condition, the legal owner.⁶ This is the rule not merely in courts of equity, but in courts of law as well. Lord Mansfield, by his decisions upon the subject of mortgages, did much to naturalize these equitable doctrines in courts of law. In a case before the King's Bench, he said: "It is an affront to common sense to say the mortgagor is not the real owner;" and therefore he held that a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security.⁷

Again, in construing a will, he held that whatever words were sufficient to carry the money due on a mortgage would carry the interest in the land along with it, saying,⁸ "that a mortgage is a charge upon the land; and whatever would give the money will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by

¹ *Barnard v. Eaton*, 2 Cush. (Mass.) 294, 304.

² *Conard v. Atlantic Ins. Co.* 1 Pet. 386, 441; *Evans v. Merriken*, 8 G. & J. (Md.) 39, 47.

³ *Timms v. Shannon*, 19 Md. 296.

⁴ *Glass v. Ellison*, 9 N. H. 69; *Gabbert v. Schwartz*, 69 Ind. 450.

⁵ *Catlin v. Henton*, 9 Wis. 476.

⁶ §§ 667, 702.

⁷ *The King v. St. Michael's, Doug.* 630.

⁸ *Martin v. Mowlin*, 2 Burr. 969, 978, decided in 1760.

a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow, notwithstanding the statute of frauds."

12. Lord Mansfield's views. — It is true that some opinions expressed by Lord Mansfield would seem to lead to the conclusion that he regarded a mortgage even at law as merely a security for a debt, and not a legal conveyance.¹ "Lord Mansfield, indeed," says Mr. Coventry,² "appears to have entertained mistaken conceptions on this and other subjects connected with the law of mortgages. His chief error seems to have been in mixing rules of equity with rules of law, and applying the former in cases where the latter only ought to have prevailed."

An unqualified adoption of some of the expressions of Lord Mansfield is inconsistent with a legal view of the nature of mortgages; it would lead to the conclusion that a mortgage is merely a security and not an estate in the land. The English courts by universal consent have refused to adopt this conclusion; but in this country his lead has been followed in nearly half of the states; and the adoption of equitable principles by courts of law has been followed by legislative enactments taking from the mortgagee the right of possession, so that in these states it is the established doctrine that a mortgage confers no title or estate upon the mortgagee, but only a security. The legal character of the mortgage has wholly given place to the equitable.

13. The courts of New York at an early day took the lead in this direction. The first important step was to deny the legal character of the mortgagee's title prior to a breach of the condition and a taking of possession by the mortgagee in consequence.³

¹ See, also, *Ren v. Bulkeley*, Doug. 292; *Eaton v. Jaques*, 2 Doug. 455.

² In note to *Powell on Mortg.* 267, n. Lord Redesdale, in *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 65, speaking of Lord Mansfield's tendency to give courts of law the power of courts of equity, said: "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known; and there are many things in his decisions which show that

his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the due administration of justice; and, though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different."

³ *Phyfe v. Riley*, 15 Wend. (N. Y.) 248.

Before default he was not allowed to take possession; on the contrary, the mortgagor in possession could maintain trespass against him.¹ But after a breach of the condition and possession taken by the mortgagee, he was regarded as invested with the legal estate.² The right to take possession, even upon a breach of the condition, was finally taken away by statute.³ This enactment was regarded as completing the change in the nature of mortgages and removing from them the last remaining common law attribute.

And yet an examination of the cases in New York in which questions in regard to the nature of mortgages are involved and discussed shows considerable conflict and contradiction of views. This is especially the case with the decisions prior to the statute taking from the mortgagee the right to recover possession of the mortgaged property; and even since that statute, although in theory the legal title remains in the mortgagor until foreclosure, it has been frequently admitted by judges and legal writers, that for some purposes and in some cases his interest must be treated and regarded as a title for the purpose of protecting his equitable rights.⁴ Where the mortgagor's interest is regarded as the legal estate in the land, it is undoubtedly a misnomer to call it an equity of redemption either before or after default.⁵ But although the term has ceased to be an accurate description of his right in the land, it has an established place among legal terms, and doubtless will continue to be used to describe his interest even in states which have by statute changed his actual rights.

14. There are incongruities in both theories. Many attempts have been made to state a perfectly harmonious and consistent system of law in regard to mortgages; but complete success has never attended them. On the one hand, the modern common law view of mortgages, by which the mortgagee is regarded as the owner of the legal estate for the purpose of protecting and enforcing his rights, and the mortgagor is regarded as the legal owner as against every other person, is objected to as presenting the incongruous position that one person may be the legal owner for one purpose, and at the same time another per-

¹ *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534.

² *Bolton v. Brewster*, 32 Barb. (N. Y.) 389.

³ 2 R. S. 312, § 57, enacted 1828.

⁴ *Thomas on Mortg.* 16; *Hubbell v. Moulson*, 53 N. Y. 225; *White v. Rittenmyer*, 30 Iowa, 268, 271.

⁵ Per Earl, C., in *Trimm v. Marsh*, 54 N. Y. 599; *Chick v. Willetts*, 2 Kans. 384, per Crozier, C. J.

son may be the legal owner for another purpose; that in one court the mortgagee is the legal owner, and in another the mortgagor is the legal owner; that after the legal title has passed to the mortgagee by a legal conveyance, it may be defeated by the act of the mortgagor from whom the title has passed, merely by payment before forfeiture.¹

On the other hand, it has been thought that by regarding a mortgage both at law and in equity as a mere security, a more harmonious and consistent doctrine regarding this instrument would be secured. It is admitted that this doctrine is anomalous. That a legal conveyance does not pass a legal title is not in accordance with legal principles.² Moreover, it has been found that in order to secure the equitable rights of parties, the mortgagee's interest must in some cases be treated and regarded as a title. This is admitted by Mr. Justice Andrews in a recent case before the Court of Appeals of New York;³ and he mentions instances in the decisions of that state where the mortgagee's interest has been so treated and regarded notwithstanding the doctrine that he has a lien only. It is claimed, however, that no title in a strict sense vests in him; but only that his interest for some purposes is in the nature of a legal title. He is treated as if he had a legal title, by being protected in his possession, when he has once acquired it, until the debt is fully paid.⁴ The only remedy for recovering possession from him in such case is by a bill in equity to redeem,⁵ as is the case where the mortgagee is regarded as holding the legal estate.

In other ways also the mortgagee is treated as holding an estate. He is deemed a purchaser to the extent of his interest, and is protected in his rights in the same way and to the same extent as a purchaser of an absolute estate.⁶ As an estate in him, his interest is protected against a claim of dower by the wife of the mortgagor when she has released this right in the mortgage, although she may be entitled to it in the equity of redemption.⁷ And so also a title acquired by the mortgagor after making the

¹ *White v. Rittenmyer*, 30 Iowa, 268, 271.

² *White v. Rittenmyer*, 30 Iowa, 268, 271.

³ *Hubbell v. Moulson*, 53 N. Y. 225.

⁴ *Mickles v. Townsend*, 18 N. Y. 575, 584; § 715.

⁵ *Hubbell v. Moulson*, 53 N. Y. 225.

⁶ See *Frisbey v. Thayer*, 25 Wend. (N. Y.) 396, 399; *James v. Johnson*, 6 Johns. (N. Y.) Ch. 417; *S. C. 2 Cowen*, 246; *Ledyard v. Butler*, 9 Paige (N. Y.), 132, 137.

⁷ *Van Dyne v. Thayre*, 19 Wend. (N. Y.) 162.

mortgage enures, by force of the covenant of warranty contained in it, to the benefit of the mortgagee.

15. What, then, are the practical distinctions between a mortgage regarded as a legal estate in the mortgagee, and a mortgage regarded as a mere personal lien? In what respect are the rights of both the mortgagor and the mortgagee, where the one view prevails, the same as they are where the other prevails; and in what respects are their rights different under the one doctrine from what they are under the other?

In the first place, wherein are the two doctrines in harmony as regards the rights and interests of the mortgagor? Everywhere the mortgagor's interest in the land may be sold upon execution; his widow is entitled to dower in it; it passes as real estate by devise; it descends to his heirs at his death as real estate; it gives him a right of settlement as an owner of real estate; he is a freeholder; he may maintain a real action for the land against a stranger, and the mortgage cannot be set up as a defence.

In the second place, wherein are the rights and interests of the mortgagee the same, whether regarded under the one theory or the other? Everywhere it is held that he has no such estate as can be sold on execution; his widow has no right of dower in it; upon his death the mortgage passes to his personal representatives as personal estate; and it passes by his will as personal property.

The practical distinctions between these views are these: Under the common law view, as we may term the former, the mortgagee is entitled to immediate possession of the mortgaged property as an incident to the title when not restrained by the terms of the mortgage; and upon default he is always entitled to the possession and may recover it by action at law, whereas, under the equitable view, the mortgagor is entitled to possession until foreclosure, unless perhaps he may by express contract give this right to the mortgagee. This is the great difference resulting from these different theories. In large degree resulting from these different ways of viewing the interest of the parties follow the further distinctions: that while generally, under the former view of the law, a tender or payment to defeat the mortgagee's title must be made at or before the law day, as the day of payment is termed, under the latter view a payment at any time, though after default, revests the interest in the mortgagor; and while under the former view it is generally held that a transfer of the mortgage interest

can only be made by an assignment or deed duly executed as a conveyance, under the latter view it is held that a mere transfer of the mortgage note by indorsement or delivery passes the interest in the land as an incident of the debt. These two distinctions do not, however, necessarily and inevitably attend the different theories.

16. How, then, may a mortgage at the present day be defined? — Baron Parke, speaking of the mortgagor said: "He can be described only by saying he is a mortgagor."¹ In the same way it may be said that the most accurate and comprehensive definition of a mortgage is that it is a mortgage. As remarked by Lord Denman, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other, in any other terms than those very words."² A definition broad enough to cover any view of the transaction, and any form of it, can only be that it is a conveyance of land as security. This embraces the two things essential to constitute a mortgage. If more be attempted, it results in a description of some one of the many forms which a mortgage may take. In a note are given references to definitions and descriptions of mortgages by several eminent authors and judges. But to define the different kinds of mortgages, and the many different rights under them, is the service attempted by a treatise on the subject.³

2. *The Nature of a Mortgage in the different States.*

17. Generally. — As already stated, the conflicting views of the nature of mortgages entertained at law and in equity have resulted in the just and harmonious system, which is now administered in the courts of England and in most of the courts of the older States of America. In these courts a mortgage is regarded as a conveyance in fee, and this construction is thought best

¹ *Litchfield v. Ready*, 20 L. J. Ex. 51.

² *Higginbotham v. Barton*, 11 Ad. & El. 307, 314.

³ Washburn's Real Prop. c. 16 § 1; Fisher on Mortg. (3d ed.) p. 2; Coventry, in Powell on Mortg. p. 4; Cruise, 1 Dig. of Law of Real Prop. (Am. ed.) tit. xv. c. i. § 11; Coote on Mortg. p. 1; Erskine v. Townsend, 2 Mass. 493, 495; Carter v. Taylor, 3 Head (Tenn.), 30; Briggs v. Fish, 2 D. Chip. (Vt.) 100; Montgomery v. Bruere, 1 Southard (N. J.), 260, 268; Lund v. Lund, 1 N. H. 39, 41; Mitchell

v. Burnham, 44 Maine, 286, 299; Wing v. Cooper, 37 Vt. 169, 179; G. S. of New Hampshire, 1867, c. 122, § 1.

By the Code of California, a mortgage is defined to be "a contract, by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." Civil Code, 1872, § 2920; adopted also by Civil Code of Dakota, 1871, § 1608. In Florida it is provided that all conveyances securing the payment of money shall be deemed mortgages. Bush's Dig. 1872, p. 605.

adapted to give to the creditor full protection in preserving and enforcing his securities, while at the same time the debtor is secured in his right to redeem. In other states, however, this system has been changed, for the most part by statute, so that a mortgage is regarded as merely a pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first. There are also a few modifications of each.

In examining the various questions that arise under the law of mortgages, it is often important to distinguish between the opinions of courts acting under these different views of the nature of a mortgage. On several topics frequent reference will be made to the distinguishing features of the two systems. On these topics authorities of several states having the same system will be harmonious, but will differ from those of several states in which the other system prevails. It is therefore thought best to give briefly, under the name of each state, the law there in force upon this fundamental matter of the nature of the conveyance in mortgage, as announced by the courts or enacted by statute.

18. In **Alabama** a mortgage passes to the mortgagee, as between him and the mortgagor, the estate in the land. It confers something more than a mere security for a debt: it confers a title under which the mortgagee may take immediate possession, unless it appears by express stipulation, or necessary implication, that the mortgagor may remain in possession until default.¹ After the law day, the legal estate is absolutely vested in the mortgagee, and the mortgagor has nothing left but an equity of redemption.² A conveyance by the mortgagee will pass the legal title, though the debt be not assigned.³ Nothing but payment, or a release of the mortgage, or a reconveyance, can operate in a court of law to revest the title in the mortgagor; and it is questioned whether payment alone after the law day is sufficient.⁴ But as against all persons other than the mortgagee and his assigns, the mortgagor is regarded as the proprietor and is entitled to the possession.⁵

19. In **Arkansas** the mortgagee was, in an early case, consid-

¹ *Knox v. Easton*, 38 Ala. 345; *Welsh v. Phillips*, 54 Ala. 309; *Toomer v. Randolph*, 60 Ala. 356.

² *Paulling v. Barron*, 32 Ala. 9; *Barker v. Bell*, 37 Ala. 354.

³ *Welsh v. Phillips*, *supra*; *Toomer v. Randolph*, *supra*.

⁴ *Powell v. Williams*, 14 Ala. 476; *Barker v. Bell*, 37 Ala. 354.

⁵ *Knox v. Easton*, 38 Ala. 345; *Mansony v. U. S. Bank*, 4 Ala. 735.

ered as having the legal estate after condition broken, following in this respect some of the earlier cases in New York.¹ In later cases, it is said that the legal title passes, at law, directly to the mortgagee, subject to be defeated by the performance of the conditions of the mortgage; and that the right of possession follows the legal title unless it be expressly provided in the deed, or clearly appears to be the intention of the parties, that the mortgagor shall remain in possession until default.² Whenever the mortgagee is entitled to possession, he may acquire it by an action of ejectment. He may upon default pursue any or all of his remedies: may bring actions for the debt, for possession, and to foreclose the equity of redemption and sell the land.³

20. In California a mortgage does not convey the legal title for any purpose, either before or after condition broken. It is a mere security for the payment of money, and passes no estate in the land. This is the declaration of the Code.⁴ "It was from a consideration of the character of the instrument," says Chief Justice Field,⁵ "as settled by these decisions and the modern cases generally, that we were induced to adopt the equitable doctrine as the true doctrine; and it was from a consideration of the provisions of the statute which led us to go beyond those cases, and carry the doctrine to its legitimate and logical result, and regard the mortgage as a security under all circumstances, both at law and in equity. Mortgages, therefore, executed before the statute, can only be treated as conveyances when that character is essential to protect the just rights of the mortgagee; mortgages since the statute are regarded at all times as mere securities, creating only a lien or incumbrance, and not passing any estate in the premises."⁶

¹ *Fitzgerald v. Beebe*, 7 Ark. 310; *Phyfe v. Riley*, 15 Wend. (N. Y.) 248; *Reynolds v. Canal & Banking Co. of N. O.* 30 Ark. 520.

² *Kannady v. McCarron*, 18 Ark. 166; *Turner v. Watkins*, 31 Ark. 429, 437; *Terry v. Rosell*, 32 Ark. 478.

³ *Fitzgerald v. Beebe*, *supra*; *Gilchrist v. Paterson*, 18 Ark. 575; *Reynolds v. Canal & Banking Co. of N. O.* 30 Ark. 520.

⁴ *Civil Code*, 1872, § 2927; *McMillan v. Richards*, 9 Cal. 365, where Mr. Justice Field examines the subject at great length; *Dutton v. Warschauer*, 21 Cal. 609; *Mack*

v. Wetzlar, 39 Cal. 247; *Goodenow v. Ewer*, 16 Cal. 461, 467; *Kidd v. Teeple*, 23 Cal. 255.

⁵ *Dutton v. Warschauer*, 21 Cal. 609, 623.

⁶ Stat. 1851, § 260, declared a mortgage shall not be deemed a conveyance whatever its terms, so as to enable the owner of the mortgage to recover possession, without a foreclosure and sale. But prior to this statute a mortgage was not a conditional estate which became absolute on a breach of condition, as at common law. *Skinner v. Buck*, 29 Cal. 253.

It is fully settled that a mortgage does not convey the title, but only creates a lien on the property, the title remaining in the mortgagor subject to the lien.¹ It is provided by statute that the mortgagee shall not be entitled to possession unless authorized by the express terms of the mortgage.² Entry and possession by the mortgagee do not affect the nature of his interest. They can neither abridge nor enlarge that interest, nor convert what was previously a security into a seisin of the freehold.³ But if the mortgagee, after condition broken, take possession by consent of the mortgagor, it is presumed, in the absence of clear proof to the contrary, that he is to receive the rents and profits, and apply them to the debt secured, and that he is to hold possession until the debt is paid.⁴ This possessory right may be transferred by express terms, though it does not pass by an ordinary assignment.⁵ Even an absolute deed without any defeasance, if in fact made to secure a debt, so that in equity it is a mortgage, passes no title to the grantee.⁶ Of course, under this view of the nature of a mortgage, payment after default operates to discharge the lien equally with payment at the maturity of the debt.⁷ Under such a deed the grantee is entitled to recover the premises in ejectment, unless the defendant in answer sets up his equities, with an offer to pay the amount of the mortgage lien, and prays that the conveyance be decreed a mortgage.⁸

But a deed of trust to secure a debt is not a mortgage requiring judicial foreclosure, but a conveyance of the legal title; and being such a conveyance and not merely a lien or charge upon the property, it is not affected by the statute of limitations which operates equally to bar the debt and a mortgage given to secure it; but the trustee under such deed may after such periods of general limitation proceed to sell the land.⁹

21. So in Colorado a mortgage is considered a security only, and does not before foreclosure confer any right of entry on the

¹ *Mack v. Wetzel*, 39 Cal. 247; *Harp v. Calahan*, 46 Cal. 222; *Jackson v. Lodge*, 36 Cal. 28; *Boggs v. Hargrave*, 16 Cal. 559; *Fogarty v. Sawyer*, 17 Cal. 589; *Bludworth v. Lake*, 33 Cal. 255; *Carpenter v. Brenham*, 40 Cal. 221; *Haffley v. Maier*, 13 Cal. 13.

² Civil Code, § 2927. The owner may make an independent contract for the

mortgagee's possession. *Fogarty v. Sawyer*, 17 Cal. 589.

³ *Nagle v. Macy*, 9 Cal. 426.

⁴ *Frink v. Le Roy*, 49 Cal. 314; *Dutton v. Warschauer*, 21 Cal. 609.

⁵ *Dutton v. Warschauer*, *supra*.

⁶ *Jackson v. Lodge*, 36 Cal. 28.

⁷ *Johnson v. Sherman*, 15 Cal. 287.

⁸ *Pico v. Gallardo*, 52 Cal. 206.

⁹ *Grant v. Burr*, 54 Cal. 298.

mortgagee.¹ But it seems that a mortgagee who has acquired possession may retain it; and that he may recover the property by ejectment against third persons not holding under the mortgagor.² The Code now provides that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the property without foreclosure and sale; but this provision does not apply to trust deeds with powers of sale.³

22. In Connecticut a mortgage passes the legal estate subject to be defeated by performance of the condition, and the mortgagee may maintain ejectment; but the mortgagor is to be regarded as the owner of the property, subject to the rights of the mortgagee to enforce payment of his debt by means of his title.⁴ When the debt is satisfied after forfeiture, if the legal title be permitted to remain vested in the mortgagee, he holds it in trust for the mortgagor.⁵ The mortgage when paid is no longer an incumbrance, though it may be a cloud on the title.⁶ Courts of law have adopted equitable principles as to the effect of a mortgage, holding that it is a conveyance merely by way of pledge for the debt, and that the mortgagee holds the title solely for this purpose, aside from preserving and enforcing his security.⁷ The mortgagor is the owner of the mortgaged land as against every one but the mortgagee. His equity of redemption may be devised, granted, levied upon, and set off in execution. The wife of a mortgagor is entitled to dower, and the husband of a mortgagor to curtesy. A mortgagor in possession may acquire a settlement, may maintain trespass against his mortgagee, and may take the emblements, without being liable to account; and although the mortgagee has only a chattel interest, — a mere pledge for the payment of the debt, — yet the legal title vests in him upon the execution of the mortgage, subject to be defeated only on performance of the condition; and after condition broken the only relief for the mortgagor is in equity.⁸

¹ *Drake v. Root*, 2 Col. 685, per Hallett, C. J.

² *Eyster v. Gaff*, 2 Col. 228.

³ Code of Civil Procedure, 1881, § 482.

⁴ *Chamberlain v. Thompson*, 10 Conn. 243, 251; *Beach v. Clark*, 6 Conn. 354; *Rockwell v. Bradley*, 2 Conn. 5; *Middletown Sav. Bank v. Bates*, 11 Conn. 519, 523.

⁵ *Cross v. Robinson*, 21 Conn. 379, 387;

Dudley v. Cadwell, 19 Conn. 218, 227; *Phelps v. Sage*, 2 Day, 151.

⁶ *Town of Clinton v. Town of Westbrook*, 38 Conn. 9; *Doton v. Russell*, 17 Conn. 146, 154; *Griswold v. Mather*, 5 Conn. 435, 440; *New Haven Savings Bank v. McPartlan*, 40 Conn. 90.

⁷ *Bates v. Coe*, 10 Conn. 280, 294; and see *Lacon v. Davenport*, 16 Conn. 331.

⁸ *Chamberlain v. Thompson*, 10 Conn. 243.

23. In *Dakota Territory* a mortgage does not entitle the mortgagee to the possession, but after the execution of it the mortgagor may agree to such change of possession upon a new consideration.¹

24. In *Delaware* a mortgage, as between the mortgagor and mortgagee, is only a security for the payment of the debt, and, so long as the mortgagor continues in possession, does not convey the legal title to the mortgagee; but in the mean time it is a lien of so high a nature, that it is not divested by a sale of the premises on a judgment subsequently obtained against the mortgagor. Yet after breach of the condition and possession obtained by the mortgagee, the legal title is in the mortgagee, and it is no longer in the power of the mortgagor, or any one claiming under him, to recover possession by ejectment.² As against every one but the mortgagee, the mortgagor in possession before foreclosure is regarded as the owner and freeholder, with the civil and political rights belonging to that character.³ The mortgagee may, upon breach of the condition, use at the same time all the remedies the law affords against the person and the property; and he cannot, without some special equity in favor of the debtor, be restrained from proceeding at his election upon either or both his remedies.⁴

25. In *Florida* a mortgage is not deemed a conveyance so as to entitle the mortgagee to recover possession without a foreclosure.⁵ It does not pass an estate in fee. It is a specific lien upon the property, and the mortgagor is divested of the title only by forfeiture of the condition and a foreclosure sale.⁶ It is held, however, that a deed of trust conveying land to trustees, with power to sell and convey it in fee and apply the proceeds to the payment of certain liabilities of the grantor, is not a mortgage, but is a conveyance which vests the legal title in the trustees.⁷

26. In *Georgia* a mortgage is a mere security for a debt, and the mortgagee can neither enter nor maintain ejectment.⁸ All he can do is to foreclose and sell, and make his money out of the sale; and the rents and profits belong to the mortgagor until the

¹ R. Codes, 1877, § 1733.

² *Hall v. Tunnell*, 1 *Houst.* 320.

³ *Cooch v. Gerry*, 3 *Har.* 280.

⁴ *Newbold v. Newbold*, 1 *Del. Ch.* 310.

⁵ *Bush Dig. of Stat.* 1872, pp. 611, 612.

⁶ *McMahon v. Russell*, 17 *Fla.* 698.

⁷ *Soutter v. Miller*, 15 *Fla.* 625.

⁸ *Vason v. Ball*, 56 *Ga.* 268; *Davis v. Anderson*, 1 *Ga.* 176; *Ragland v. Justices*, 10 *Ga.* 65; *Elfe v. Cole*, 26 *Ga.* 197; *United States v. Athens Armory*, 35 *Ga.* 344; *Seals v. Cashin*, 2 *Ga. Dec.* 76; *Carter v. Gunn*, 64 *Ga.* 651.

sale, for the reason that the title remains in him until the sheriff sells him out, and puts another in his place.¹ No title passes by the mortgage: it is only by foreclosure that the title is changed.² It is now declared in the Code that a mortgage is only a security for a debt, and passes no title.³ But an absolute deed with a bond to reconvey passes the legal title.⁴ The deed and bond do not, separately or together, indicate the creation of a mere lien, but the purpose indicated is, to divest the grantor of title, and to vest title in the grantee, until the debt be paid.⁵

27. In Illinois it is held, in accordance with the rulings of the English courts of common law jurisdiction, that, as an incident to the ownership in fee by the mortgagee, he can enter before condition broken or bring ejectment, unless the mortgage provides that the mortgagor shall retain possession. In such case, and always upon breach of the condition, the mortgagee may bring his action without giving the party in possession any notice to quit.⁶ The condition is broken when one or more instalments are due and unpaid; because, the condition being an entirety, it is indivisible, and a failure to pay any part of the debt is a breach of the condition. The mortgagee may pursue all his remedies at the same time: he may proceed against the debtor personally; against the property by bill in chancery for a strict foreclosure, or for a foreclosure and sale; or, when the debt is all due, by *scire facias*; and he may bring ejectment for the possession, or make peaceable entry.⁷ But even after condition broken, a mortgage is not an absolute outstanding title of which a stranger can take advantage to defeat a recovery in ejectment by the mortgagor.⁸ Except as against the mortgagee, the mortgagor is regarded for all beneficial purposes as the owner of the land.⁹

28. In Indiana the common law doctrine, that the legal estate vests in the mortgagee, was adhered to many years, as appears

¹ *Vason v. Ball*, *supra*, per Jackson, J.

² *Burnside v. Terry*, 45 Ga. 621; *Jackson v. Carswell*, 34 Ga. 279.

³ Code, 1873, § 1954.

⁴ § 292; *Broach v. Barfield*, 57 Ga. 601; *Phinizy v. Clark*, 62 Ga. 623; *Allen v. Frost*, 62 Ga. 659.

⁵ *Gibson v. Hough*, 60 Ga. 588; *West v. Bennett*, 59 Ga. 507.

⁶ *Carroll v. Ballance*, 26 Ill. 9; *Vansant v. Allmon*, 23 Ill. 30, 33; *Delahay v.*

Clement, 3 Scam. 201, 202; *Nelson v. Pinegar*, 30 Ill. 473; *Jackson v. Warren*, 32 Ill. 331; *Pollock v. Maison*, 41 Ill. 516; *Harper v. Ely*, 70 Ill. 581.

⁷ *Karnes v. Lloyd*, 52 Ill. 113; *Erickson v. Rafferty*, 79 Ill. 209.

⁸ *Hall v. Lance*, 25 Ill. 277; *Oldham v. Pfleger*, 84 Ill. 102.

⁹ *Fitch v. Pinckard*, 4 Scam. 69; *Vallette v. Bennett*, 69 Ill. 632.

by the earlier cases : but it no longer prevails. The settled doctrine in this state is that a mortgage is but a lien on the land as a security for the debt, and that the legal title remains in the mortgagor, subject to the lien of the mortgage.¹ It is provided by statute that, in the absence of stipulations to the contrary, the mortgagor, until foreclosure, may retain possession of the mortgaged estate.²

29. Iowa. — The interest of the mortgagee is regarded as a lien upon the land for the debt, which may, by certain proceedings, ripen into a title, or rather may divest the title of the mortgagor. Some act of the mortgagee is necessary, that he may acquire an indefeasible title which the mortgagor will not be able to defeat by redemption. The interest of the mortgagor is an estate of inheritance, which is in no way affected by the mortgage before entry and foreclosure, except by the lien created. The fact that a mortgage confers upon the mortgagee a right of entry upon breach of the condition gives him no additional right, inasmuch as the right exists under the law, without such provision.³ It is now provided by statute that, in the absence of stipulations to the contrary, the mortgagor retains the legal title and the right of possession.⁴

A conveyance absolute in terms to secure the payment of a debt, though in substance a mortgage, differs from a statutory mortgage in that the legal title passes to the grantor, who, by virtue thereof, can at any time before or after condition broken recover possession by an action at law, unless the grantor interposes his equitable defence.⁵

30. In Kansas the legal estate remains in the mortgagor after making a mortgage, and it is provided by statute that, in the absence of stipulations to the contrary, he may retain possession of the mortgaged estate.⁶ "Some of the states still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that re-

¹ *Fletcher v. Holmes*, 32 Ind. 497, 513; *Francis v. Porter*, 7 Ind. 213; *Morton v. Noble*, 22 Ind. 160; *Grable v. McCulloh*, 27 Ind. 472; *Reasoner v. Edmundson*, 5 Ind. 393.

² 2 G. & H. Stat. p. 335. Prior to 1843, when this statute was passed, the mortgagee could recover possession at any time unless restrained by the terms of the mortgage.

³ *White v. Rittenmyer*, 30 Iowa, 268; *Courtney v. Carr*, 6 Iowa, 238; *Hall v. Savill*, 3 Greene, 37.

⁴ R. Code 1880, § 1938.

⁵ *Richards v. Crawford*, 50 Iowa, 494; *Burdick v. Wentworth*, 42 Iowa, 440; *Farley v. Goocher*, 11 Iowa, 570.

⁶ *Dassler's Stat.* 1876, c. 68, § 1; *Seckler v. Delfs*, 25 Kana. 159.

mains of the old theories is their nomenclature. In this state, a clear sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession, on the bench and at the bar, would more readily understand and fully realize the new condition of things.”¹

A trust deed, being merely a mortgage, is regarded as covering no estate or title in the land, but as creating merely a lien.²

31. In **Kentucky** a mortgage passes the legal title to the mortgagee. Upon a breach of the condition, or before a breach, when not restrained by the terms of the mortgage, he may recover possession of the property.³ Upon a breach of the condition, also, the title becomes absolute in the mortgagee at law. The only right which the mortgagor has is an equity of redemption. He cannot prevent the legal operation of the deed by showing that it was fraudulently executed by him. This is neither a valid, legal, nor equitable defence.⁴

32. In **Louisiana** a mortgage is a species of alienation, but not a sale. It is an alienation of a right on the property, not of the property itself. The title, as well as the possession, remains in the owner.⁵ The Civil Code of this state defines a mortgage as “a right granted to the creditor over the property of the debtor for the security of his debt, and gives him the power of having the property seized and sold in default of payment. Mortgage is a species of pledge, the thing mortgaged being bound for the payment of the debt, or fulfilment of the obligation. The conventional mortgage is a contract, by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession.”⁶ A conventional mortgage is one founded upon the covenants of the parties in contradistinction to a legal mortgage.

33. In **Maine** a mortgage vests the mortgagee with the legal

¹ *Chick v. Willetts*, 2 Kans. 384. See, *Brookover v. Hurst*, 1 Met. 665; *Redman also, Waterson v. Devoe*, 18 Kans. 223. *v. Sanders*, 2 Dana, 68.

² *Lenox v. Reed*, 12 Kans. 223, 227;

⁴ *Brookover v. Hurst*, *supra*.

Robbins v. Sackett, 23 Kans. 301.

⁵ *Duclaud v. Rousseau*, 2 La. Ann. 168.

⁶ *Stewart v. Barrow*, 7 Bush, 368;

⁶ Civil Code, 1870, arts. 3278, 3279, 3290.

estate,¹ and it is provided by statute that he may enter before breach of the condition, when there is no agreement to the contrary.² The mortgagor, as to every one but the mortgagee, is considered as having the legal estate and the power of conveying it or incumbering it subject to the lien of the mortgage.³

34. *Maryland.*—The mortgagee has the legal estate, and is entitled to possession immediately upon the execution of the mortgage, unless there be some agreement of the parties to the contrary.⁴ Ordinarily he may pursue all his remedies at the same time.⁵ As to all other persons, the mortgagor is deemed the owner. He may, therefore, when the mortgage allows him to remain in possession until default, maintain ejectment against a third party, who rests his defence entirely on possession and an outstanding title in the mortgagee.⁶ Moreover, being the substantial owner, he is entitled to sue for damages done the estate by a third person.⁷

35. *In Massachusetts* the English characteristics of a mortgage are retained. It confers upon the mortgagee a legal estate and the right of possession. "The first great object of a mortgage," says Chief Justice Shaw,⁸ "is in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is, that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee; because that construction best secures him in his remedy and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in all other respects dealt

¹ § 702; *Blaney v. Bearce*, 2 Me. 132.

² Rev. Stat. 1871, c. 90, § 2.

³ *Wilkins v. French*, 20 Me. 111.

⁴ *Brown v. Stewart*, 1 Md. Ch. 87; *Leighton v. Preston*, 9 Gill, 201; *Jamieson v. Bruce*, 6 G. & J. 72, per Archer, J.; *McKim v. Mason*, 8 Md. Ch. 186; *Sumwalt v. Tucker*, 34 Md. 89; *An-*

napolis & Elkridge R. R. Co. v. Gantt, 39 Md. 115.

⁵ *Wilhelm v. Lee*, 2 Md. Ch. 322; *Brown v. Stewart*, 1 Md. Ch. 87.

⁶ *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. 225, 237.

⁷ *Annapolis & Elkridge R. R. Co. v. Gantt*, 39 Md. 115.

⁸ *Ewer v. Hobbs*, 5 Met. 1-3.

with as the estate of the mortgagor. And all the statutes upon the subject are to be so construed; and all rules of law, whether administered in law or in equity, are to be so applied as to carry these objects into effect." And in another case the same eminent jurist says: ¹ "Mortgaging is not such a conveying away of the estate as divests the entire title of the owner. It is a charge or incumbrance created out of that estate, and may amount to a small part only of its value. Although, as between mortgagor and mortgagee, it is a transmission of the fee, which gives the mortgagee a remedy in the form of a real action, and constitutes a legal seisin, yet to most other purposes a mortgage, before the entry of the mortgagee, is but a pledge and real lien, leaving the mortgagor to most purposes the owner."²

36. In Michigan no action of ejectment can be maintained by a mortgagee, or his assigns or representatives, for the recovery of the mortgaged premises, until the title shall have become absolute upon a foreclosure of the mortgage.³ Not being allowed as mortgagee to bring an ejectment suit, he is not allowed to maintain a bill for foreclosure as a proceeding auxiliary to the ejectment suit. Nor can he convert a bill in aid of ejectment proceedings into a foreclosure bill by merely substituting the ordinary prayer for foreclosure in place of the prayer originally made.⁴ The mortgagee has no legal title in the land mortgaged, but only a lien for the security of the mortgage debt.⁵ A mortgage in common law form, executed prior to the statute which deprived mortgagees of the right of possession, gave the mortgagee or his assigns the right to go into the enjoyment of the lands and hold them until redeemed.⁶ Under the existing statute a mortgagor is entitled to recover possession from his mortgagee at any time before his rights have been foreclosed.⁷

A conveyance in trust to secure an indebtedness is only a mortgage, and does not preclude the mortgagor from claiming the title in fee.⁸ But an absolute deed, though intended as a mort-

¹ *Howard v. Robinson*, 4 Cush. 119-123.

² See, also, § 702; *Norcross v. Norcross*, 105 Mass. 265; *Bradley v. Fuller*, 23 Pick. 1, 9; *Hagood v. Blood*, 11 Gray, 400; *Sparhawk v. Bagg*, 16 Ib. 583; *Steel v. Steel*, 4 Allen, 417; *Silloway v. Brown*, 12 Ib. 30.

³ *Comp. Laws of Mich.* 1871, p. 1775.

⁴ *Livingston v. Hayes*, 43 Mich. 129.

⁵ *Caruthers v. Humphrey*, 12 Mich. 270;

Gorham v. Arnold, 22 Mich. 247; *Wagar v. Stone*, 36 Mich. 364; *Lee v. Clary*, 38 Mich. 223.

⁶ *Hoffman v. Harrington*, 33 Mich. 392; *Schwarz v. Sears*, Walk. Ch. 170; *Stevens v. Brown*, Ib. 41; *Mundy v. Munroe*, 1 Mich. 68.

⁷ *Humphrey v. Hurd*, 29 Mich. 44.

⁸ *Flint & Pere Marquette Ry. Co. v. Auditor General*, 41 Mich. 635.

gage gives the grantee the legal title and the right of possession.¹

37. In Minnesota it is declared by statute that a mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of it without a foreclosure.² Referring to this statute Chief Justice Emmet says:³ "This, it appears to me, deprives the mortgagee of the only material advantage which remained to him from being considered the owner of the fee; and although, out of deference to the past, we may still regard him as the legal owner, he is such in theory only, having no right to interfere with the possession save by consent of the mortgagor. The effect of the change just referred to is to dissipate whatever of title he may formerly have had, beyond that of a mere lien or security. And although the mortgagee may, by obtaining a strict foreclosure, eventually secure possession, and thus complete his title under the mortgage, yet, as the courts may, and in practice generally do, direct the property to be sold, even when a strict foreclosure is asked for, he is by no means certain of ever perfecting that title, which the mortgage purports to convey. And if the property, by direction of the court or otherwise, be sold to satisfy the mortgage, the purchaser, when he receives his deed, takes, not the title of the mortgagee, for that is extinguished by the application of the proceeds of the sale; nor does he take simply the title of the mortgagor at the time of the sale, for that is incomplete; but he takes the title which was in the mortgagor at the time the mortgage was given, which is equivalent to both."

38. In Mississippi upon a breach of the condition of a mortgage the legal title becomes absolute in the mortgagee, who thereupon becomes entitled to the possession of the property as an incident to the title.⁴ The Code now provides that before a sale under a mortgage, or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed, except as against the mortgagee and his assigns, or the trustee, after breach of the condition of the mortgage or deed.⁵ The debt is considered as the principal, and the mortgage as an incident

¹ Jeffery v. Hursh, 42 Mich. 563.

St. Paul & Pacific R. R. Co. 24 Minn. 464.

² Revision 1866, p. 540.

³ Adams v. Corriston, 7 Minn. 456; ⁴ Hill v. Robertson, 24 Miss. 368; Harmon v. Short, 8 S. & M. 433.
and see Donnelly v. Simonton, 7 Minn. 167; Berthold v. Holman, 12 Minn. 335; ⁵ R. Code, 1871, § 2295; R. Code, 1880, Berthold v. Fox, 13 Minn. 501; Rice v. § 1204.

only. The mortgagee, notwithstanding the form of the conveyance, has but a security. The principles long established in chancery have, under the Code, become naturalized in the courts of common law, so that until foreclosure the mortgagee is regarded as having a chattel interest only. Even after the mortgagee has taken possession, the mortgaged estate is regarded as a pledge only.¹

As respects third persons, and the mortgagee also until after forfeiture, the mortgagor is the owner of the legal estate, and the mortgagee has only a security for the debt. "The legal title," says Chief Justice Simrall, in a recent case,² "may be asserted by the mortgagee, but only for the protection of his debt, and to make the security available for its payment."

39. *Missouri*. — By a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee. The addition of a power to sell, without judicial proceedings to foreclose, cannot avoid the legal effect of the grant.³ The trustee, after dishonor of the notes secured, may enter, and without sale or foreclosure may maintain his possession for the use of the beneficiary, not only against all outsiders but against the maker of the deed himself, until the payment of the debt. It has long been established in this state that after condition broken the mortgagee may maintain ejectment.⁴

Where a mortgage debt is payable by instalments, the condition is broken by non-payment of any one of them, and the mortgagee may thereupon enter or bring ejectment, and it is no defence to such a suit that all the instalments are not due. The authorization contained in a mortgage, to sell only in event that "the said notes should not be well and truly paid," should be construed to mean in case they should not be paid as they respectively become due. The mortgagee is not by such condition compelled to

¹ *Buckley v. Daley*, 45 Miss. 338, 345. "The relation of debtor and creditor exists," says Chief Justice Peyton, "and the equity of redemption is unimpaired. Although the mortgagee has a chattel interest only, yet, in order to render his pledge available, and give him the intended benefit of his security, it is considered as real property to enable him to maintain ejectment for the recovery of the possession of the land mortgaged;

when contemplated in every other point of view, it is personal property." To same effect is *Carpenter v. Bowen*, 42 Miss. 28, 49.

² *Buck v. Payne*, 52 Miss. 271.

³ *Johnson et al. v. Houston*, 47 Mo. 227; *Woods v. Hilderbrand*, 46 Mo. 284; *Kennett v. Plummer*, 28 Mo. 142.

⁴ *Wallop v. McKinney*, 10 Mo. 229; *Sutton v. Mason*, 38 Mo. 120; *Reddick v. Gressman*, 49 Mo. 389.

wait till the last note is dishonored before applying his remedy.¹ But although a mortgage is a conveyance in fee upon condition, it is, even after the condition is broken and the legal title has passed to the mortgagee, merely a security for the debt, and is extinguished, and the title revested, whenever the debt is paid.²

39 a. Montana Territory. — A mortgage of real property is not deemed a conveyance, whatever its term, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale.³

40. Nebraska. — The doctrine is established that the mortgagor is not seised of the freehold, either at law or in equity, either before or after condition broken.⁴ It is provided by statute that the mortgagor, in the absence of stipulations to the contrary, retains the legal title and right of possession.⁵ A deed of trust to secure the payment of a debt, being in effect a mortgage, is held, in accordance with the general rule that a mortgage does not pass the legal title, not to vest a legal estate in the trustee.⁶

41. In Nevada the court seem inclined to hold that the title does not pass from the mortgagor before breach of the condition.⁷ It is provided by statute that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the land, without a foreclosure and sale.⁸ But a deed absolute in form vests the legal title in the grantee.⁹

42. New Hampshire. — The seisin, or possession, as well as the title, passes directly to the mortgagee unless he is restrained by the provisions of the deed; and upon a breach of the condition he is in any case entitled to the possession. The mortgagor retains, as against the mortgagee, nothing more than a mere power to regain the fee upon the performance of a condition, and this condition is strictly a condition precedent.¹⁰ As against all

¹ *Reddick v. Grossman*, 49 Mo. 389.

² *Pease v. Pilot Knob Iron Co.* 49 Mo. 124.

³ *Laws 1877*, § 359.

⁴ *Kyger v. Ryley*, 2 Neb. 20, 28; *Hurley v. Estes*, 6 Neb. 386; *Union Mut. Life Ins. Co. v. Lovitt*, 10 Neb. 301.

⁵ *Compiled Stats. 1881*, p. 394.

⁶ *Webb v. Hoselton*, 4 Neb. 308; *Kyger v. Ryley*, 2 Neb. 20, 28; *Hurley v. Estes*, 6 Neb. 386.

⁷ *Whitmore v. Shiverick*, 3 Nev. 288; *Hyman v. Kelly*, 1 Nev. 179.

⁸ 1 *Comp. Laws*, § 1323.

⁹ *Brophy Mining Co. v. Brophy & Dale Gold & Silver Mining Co.* 15 Nev. 101.

¹⁰ *Brown v. Cram*, 1 N. H. 169; *Southern v. Mendum*, 5 N. H. 420; *M'Murphy v. Minot*, 4 N. H. 251, 255; *Tripe v. Marcy*, 39 N. H. 439; *Hobart v. Sanborn*, 13 N. H. 226.

other persons the mortgagor is regarded as the owner, and may maintain a real action to recover possession. The mortgagor has the legal title merely so far as is necessary, in order to enable him to obtain the full benefit of the security, and prevent any violation of his rights under the mortgage.¹ Whenever the mortgagee is entitled to possession he may doubtless treat the possession of the mortgagor as a disseisin, at his election, and may at once maintain a writ of entry for the recovery of possession, without notice to quit; but until such election the possession of the mortgagor cannot be regarded as a disseisin, but as permissive, and bearing in many respects a close analogy to strict tenancy at will or at sufferance. Until this power of election is exercised, the mortgagor is in with the privity and assent of the mortgagee, and in subordination to his title; and it is therefore held, upon the ground of such presumed assent, that the mortgagor is not liable to the mortgagee for the rents and profits while so in possession.²

43. In New Jersey the nature of the mortgage as a conveyance of an estate to the mortgagee, in fee simple, subject to be defeated by the performance of the condition, remains as it was at common law, with the modification that the mortgagee cannot enter immediately as at common law, but only upon breach of the condition.³ A mortgage is merely auxiliary to the debt, and the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, even after the day of payment named in the condition. In fact, the latter conclusion will necessarily follow whenever the mortgage is regarded, not as a common law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose.⁴ In this state the generally received aspect in which a mortgage is regarded is as a mere security for the debt.⁵

¹ *Ellison v. Daniels*, 11 N. H. 274; *Parish v. Gilmanston*, 11 N. H. 293, 298; *Whittemore v. Gibbs*, 24 N. H. 484; *Great Falls Co. v. Worster*, 15 N. H. 412, 444.

² *Chellis v. Stearns*, 22 N. H. 312; *Furbush v. Goodwin*, 29 N. H. 321, 332.

³ *Sanderson v. Price*, 1 Zab. 637, 646, note; *Shields v. Lozear*, 34 N. J. L. 496, per *Depue, J.*; *Kircher v. Schalk*, 39 N. J. L. 335, 337.

⁴ *Wade v. Miller*, 32 N. J. L. 296; *Schalk v. Kingsley*, 42 N. J. L. 32, 35.

⁵ *Shields v. Lozear*, 34 N. J. L. 496, per

Depue, J., citing *Osborne v. Tunis*, 1 Dutch. 633, 651; *Montgomery v. Brucere*, 1 South. 260, 279, per *Southard, J.*, whose dissenting opinion was adopted in the Court of Errors, 2 South. 865.

The case of *Sanderson v. Price*, *supra*, is referred to by *Depue, J.*, in *Woodside v. Adams*, 40 N. J. L. 417, 422, where he says that "this decision, though perhaps not satisfactory to the profession when it was promulgated, has come to be regarded as settled law; and it may now be considered the established doctrine of the

43 a. New Mexico Territory. — In the absence of a stipulation to the contrary, the mortgagor of real property has the right of possession thereof.¹

44. New York. — Following the views of Lord Mansfield, the courts of New York from the first regarded a mortgage as merely a security of a personal nature upon the land of the mortgagor, who retained the legal title, at least until possession taken.² But prior to the Revised Statutes of 1828, the title of the mortgagee must in fact have been something not very different from the legal estate, for unless prevented by the terms of the mortgage he had the right to recover possession of the property by ejectment, and after default he could so recover it at any time. This right was taken away then, and so far as possession before foreclosure is concerned, his only right is to retain possession when he has once obtained it by the mortgagor's consent.³ It is said that he does not, however, acquire any estate from his possession.⁴

45. In North Carolina upon the execution of a mortgage the mortgagor becomes the equitable, and the mortgagee the legal, owner, and this relative situation remains until the mortgage is

courts of this state that a mortgage of lands is not a common law conveyance on condition, but a mere security for the mortgage debt, the legal estate being considered as subsisting in the mortgagee only for that purpose. The consequence of these decisions is the separation, in legal contemplation, of the estate of the mortgagor from that of the mortgagee, and the recognition of an actual and distinct legal estate in each. The legal estate of the mortgagee, after breach of condition, has all the incidents of a common law title, for the purposes of an action of ejectment; but its existence is, nevertheless, regarded as compatible with a legal estate at the same time in the mortgagor. This legal estate of the mortgagor is capable of conveyance, mortgage, or a sale under execution against him, at any time before his estate is divested by foreclosure.

"The cases clearly recognize the equity of redemption of a mortgagor as a legal estate, and as such it must subsist until extinguished in the manner in which legal estates are by law extinguishable. Entry

on the mortgaged premises does not work an extinguishment. It merely operates to transfer the possession to the mortgagee with all the rights that actual possession confers, leaving the ultimate rights of the parties unaffected."

¹ Laws 1876, c. 36, § 8.

² *Waters v. Stewart*, 1 Caines Cas. 47, per Kent, J.; *Jackson v. Willard*, 4 Johns. 41; *Runyan v. Mersereau*, 11 Ib. 534; *Packer v. Rochester & Syracuse R. R. Co.* 17 N. Y. 283; *Power v. Lester*, 23 N. Y. 527; *Merritt v. Bartholick*, 36 N. Y. 44; *Trim v. Marsh*, 54 N. Y. 599; *Bryan v. Butts*, 27 Barb. 503; *Calkins v. Calkins*, 3 Ib. 305; *Stanard v. Eldridge*, 16 Johns. 254; *Jackson v. Bronson*, 19 Ib. 325; *Astor v. Hoyt*, 5 Wend. 603; *S. C. 2 Paige*, 68; *Bell v. Mayor of New York*, 10 Paige, 49.

³ 2 R. S. 312, § 57; *Waring v. Smyth*, 2 Barb. Ch. 119, 135. The mortgagee cannot maintain an action to recover the mortgaged premises. Code of Civil Procedure 1880, § 1498.

⁴ *Parker v. Rochester & Syracuse R. Co.* 17 N. Y. 283, 295. See § 13.

redeemed or foreclosed. Until the day of redemption is passed the mortgagor has no special equity, but he may pay the money according to the proviso, and avoid the conveyance at law; and this privilege is termed his legal right of redemption.¹

After the special day of payment has passed, the mortgagor still has an equity of redemption until there is a foreclosure, and this right is regarded as a continuance of the old estate; and so long as he is permitted to remain in possession, he is considered to hold by virtue of his ownership, and is not accountable for the rents and profits of the mortgaged lands. If the mortgagor be allowed to remain in possession for a long period by the acquiescence and implied approval of the mortgagee, he is not a trespasser; and although he may not be a tenant, he is a permissive occupant, and as such is entitled to a reasonable demand to terminate the implied license before an action can be brought to recover possession.²

The mortgagee after forfeiture may recover the land in an action at law by virtue of his title as mortgagee.³

46. In Ohio a mortgagee is regarded as holding the legal title to the estate during the continuance of the mortgage, but neither in a court of law nor of equity is he permitted to use this legal title except for the purpose of making effectual the security.⁴ The legal title as between the parties is held to be in the mortgagee. As to all the world beside, it is in the mortgagor. After condition broken, the mortgagee may recover possession by an action of ejectment.⁵

47. By statute in Oregon a mortgagor cannot against his will be divested of possession of the mortgaged premises, even upon default, without a foreclosure and sale.⁶ But if a mortgagor choose, he can give possession to the mortgagee, and when this is done, and the duration of the mortgagee's possession is not lim-

¹ *Hemphill v. Ross*, 66 N. C. 477; and see *Ellis v. Hussey*, 66 N. C. 501. A mortgagor in possession is a freeholder within the meaning of an act relating to jurors. He has not any legal estate, but the act does not provide that he shall be a legal freeholder; that he is an equitable freeholder is sufficient. *State v. Ragland*, 75 N. C. 12.

² *Hemphill v. Ross*, *supra*.

³ *Witkowski v. Watkins*, 84 N. C. 456.

⁴ *Harkrader v. Leiby*, 4 Ohio St. 602.

"But it is incorrect to say that a mortgage does no more than to create a mere lien upon the property." Per Ranney, J.

⁵ *Allen v. Everly*, 24 Ohio St. 97, 114; *Rands v. Kendall*, 15 Ohio, 671.

⁶ Civil Code, § 323; *Besser v. Hawthorn*, 3 Oregon, 129; *Anderson v. Baxter*, 4 Oregon, 110; *Semple v. Bank of British Columbia*, 5 Sawyer, 88; S. C. lb. 394.

ited by agreement, the latter may retain possession until the debt is paid; and until it be paid the mortgagor cannot recover possession by an action of ejectment.¹

48. In Pennsylvania a mortgage passes to the mortgagee the title and right of possession to hold till payment be made. He may enter at pleasure, and take actual possession. His estate is conditional, and ceases upon payment of the debt; but until the condition is performed, both his title and his right of possession are as substantial and real as though they were absolute.² As between the parties, the mortgage transmits the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. As to all others, the mortgage is a lien merely and not an estate. This is the view taken both in courts of equity and courts of law.³ It is well settled that a mortgagee or his assignee may maintain ejectment and recover possession of the mortgaged property before the condition is broken, unless there be a stipulation in the instrument to the contrary.⁴

49. Rhode Island. — The common law doctrine of the nature of mortgages prevails in this state. The mortgagee may recover possession by suit at law. Upon any breach of the condition, such as the non-payment of interest, the mortgagee may maintain ejectment, though the principal sum be not due.⁵ The mort-

¹ *Roberts v. Sutherlin*, 4 Oreg. 219.

² "Thus we perceive," says Chief Justice Agnew in a recent case, "an interest, or estate in the land itself, capable of enjoyment, and enabling the mortgagee to grasp and hold it actually, and not a mere lien or potentiality, to follow it by legal process and condemn it for payment. The land passes to the mortgagee by the act of the party himself, and needs no legal remedy to enforce the right. But a lien vests no estate and is a mere incident of the debt, to be enforced by a remedy at law, which may be limited. It is true, if the mortgagee be held out, he may have to resort to ejectment, but this is to avoid a conflict, and the statutory penalties for forcible entry, for otherwise he may take peaceable possession, and is not liable as a trespasser." *Tryon v. Munson*, 77 Pa. St. 250; and see numerous cases in that state cited by the learned judge in support, and in illustration, of this doctrine.

³ *Brobst v. Brock*, 10 Wall. 519.

⁴ *Youngman v. Elmira & Williamsport R. R. Co.* 65 Pa. St. 278, 285, and cases cited.

⁵ *Carpenter v. Carpenter*, 6 R. I. 542; *Waterman v. Matteson*, 4 R. I. 539, 545. "Formerly," says Chief Justice Ames, "the right of the mortgagor was, upon breach of the condition of the mortgage, wholly gone at law; and his equity to redeem was recognized only by the tribunal able to enforce such a right. It is true that in modern times the courts of law have, for many purposes, treated the mortgagor in possession as the real owner of the estate, looking upon a mortgage in the same light that a court of equity does, as a mere security for the mortgage debt; but we can see no reason why such courts should recognize in a mortgagor in possession under a forfeited mortgage greater rights over the mortgaged estate than courts of equity do."

gagee's remedy for waste done by the mortgagor, when a writ of estrepement will not lie, is usually to be sought in equity; but it is a wrong at law also, and therefore a mortgagee may maintain against a mortgagor an action of replevin for wood and timber cut on the land in waste of the same.¹

50. By statute in South Carolina it is provided that the mortgagee shall not be entitled to maintain any possessory action for the mortgaged estate even after the mortgage is due, but that the mortgagor shall still be deemed the owner of the land and the mortgagee the owner of the money lent or due.²

51. In Tennessee the legal title vests in the mortgagee, who is entitled to immediate possession, unless the mortgage otherwise provides. He may recover possession without first giving notice to quit.³

52. Texas. — A mortgage is but a security, and the title remains in the mortgagor, subject to be divested by foreclosure. In this respect a deed of trust is held not to differ from a mortgage; the legal title and right of possession remain with the grantor.⁴

53. Utah Territory. — It is provided that a mortgage shall not be deemed a conveyance, so as to entitle the mortgagee to recover possession without foreclosure.⁵

54. In Vermont the mortgagor's right of possession is by statute continued as against the mortgagee until condition broken, unless otherwise stipulated in the mortgage.⁶ Upon the happening of that event the interest of the mortgagor becomes absolutely vested in the mortgagee, and he has a right to the immediate possession of the estate.⁷ He may assert this right by entering peaceably by his own act, or may bring an action of ejectment without previous notice to quit. Until he asserts this right, the mortgagor in possession is regarded as the owner of the land, and may use and occupy it without accounting to the mortgagee.⁸

¹ *Waterman v. Matteson*, *supra*; § 688.

² R. S. 1873, p. 536; *Thayer v. Cramer*, 1 McCord Ch. 395; *Nixon v. Bynum*, 1 Bailey, 148; *Hughes v. Edwards*, 9 Wheat. 489. See *In re Bennett*, 2 Hughes, 156, 158.

³ *Henshaw v. Wells*, 9 Humph. 568; *Vance v. Johnson*, 10 Ib. 214.

⁴ *Wright v. Henderson*, 12 Tex. 43;

Walker v. Johnson, 37 Ib. 127, 129; *Mann v. Falcon*, 25 Tex. 271.

⁵ Civil Practice Act, 1870, § 260; Compiled Laws 1876, p. 478.

⁶ Gen. Stat. 1870, c. 40, § 12.

⁷ *Hagar v. Brainerd*, 44 Vt. 294; *Lull v. Matthews*, 19 Vt. 322.

⁸ *Hooper v. Wilson*, 12 Vt. 695; *Wilson v. Hooper*, 13 Vt. 653; *Walker v. King*, 44 Vt. 601.

55. *Virginia.* — At law, the mortgagee has the legal estate, and the immediate right of possession, unless there be some stipulation in the mortgage deed to the contrary. Upon a breach of the condition, the mortgagee may enter, or recover possession by action without previous notice. He is then, to all intents and purposes, the legal owner of the land, and vested with full legal title. The mortgagor is then regarded as a tenant at sufferance, and is not entitled to the emblements. In equity, however, the mortgagor may redeem, and the mortgagee in possession is regarded as merely a trustee of the property, with liability to account.¹ Trust deeds are used almost exclusively in place of mortgages, and the legal title vests in the grantee in such deeds.

55 *a. Washington Territory.*² — A mortgage of real property is not deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law.

56. *West Virginia.* — Trust deeds are used in place of mortgages. The law in regard to mortgages is that which prevailed in Virginia before the separation.

57. In *Wisconsin* the fee of the premises does not vest in the mortgagee, except upon foreclosure sale.³ It is provided by statute that no action shall be maintained by the mortgagee for the recovery of possession of the mortgaged premises until the equity of redemption shall have expired.⁴ The statute in effect preserves the fee in the mortgagor until foreclosure,⁵ when it vests in the purchaser at the sale. When, however, the mortgagee has, after default, gone into peaceable possession, he cannot be ejected by the mortgagor while the mortgage remains unsatisfied. The only remedy of the mortgagor is by bill to redeem, under which he must pay whatever is due upon the mortgage debt.⁶

58. As a summary of this examination it will be found that in Alabama, Arkansas, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia, the courts have adhered to

¹ 2 *Minor's Institutes*, 300-330; *Faulkner v. Brockenbrough*, 4 *Rand.* 245.

² *G. L.* 1877, § 550.

³ *Wood v. Trask*, 7 *Wis.* 566; *Schreiber v. Carey*, 48 *Wis.* 208.

⁴ *Rev. Stat.* 1871, p. 1671.

⁵ *Wood v. Trask*, *supra*.

⁶ *Hennesy v. Farrell*, 20 *Wis.* 42; *Tallman v. Ely*, 6 *Wis.* 244; *Gillett v. Eaton*, 6 *Wis.* 30; *Fladland v. Delaplaine*, 19 *Wis.* 459; *Avery v. Judd*, 21 *Wis.* 262; *Stark v. Brown*, 12 *Wis.* 572; *Roche v. Knight*, 21 *Wis.* 324; *Schreiber v. Carey*, 48 *Wis.* 208, 214.

the doctrines of the common law as regards the nature of the mortgage interest and the respective rights of the parties. They regard the mortgage deed as passing at once the legal title to the mortgagee, subject to defeasance, as a condition subsequent which divests or defeats the estate on performance of it. The right of possession follows the title so that the mortgagee may enter into possession of the mortgaged property immediately unless restrained by express provision, or necessary implication, of the mortgage; and in any case upon breach of the condition he becomes entitled to the possession and may recover it by action.

In Delaware, Mississippi, and Missouri the common law doctrine is so far modified, that until breach of the condition and possession taken the mortgagor is regarded as the owner of the legal estate, not only as against third persons, but as against the mortgagee himself. But upon forfeiture and entry of the mortgagee, he is regarded as having the legal title for the purpose of enforcing his demand and obtaining satisfaction out of the property.

In other states the common law doctrine upon this subject has been wholly abrogated by statute, and both at law and in equity, and both before and after a breach of the condition, a mortgage is regarded as merely a lien upon the property. It passes no title or estate in it to the mortgagee, and gives him no right of possession before foreclosure. This is the doctrine of mortgages in California, Dakota Territory, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana Territory, Nebraska, Nevada, New Mexico Territory, New York, Oregon, South Carolina, Texas, Utah Territory, Washington Territory, and Wisconsin. In Iowa, Kansas, and Nevada the statutes imply that the parties may by express stipulation give the right of possession to the mortgagee.

59. Grouping the states geographically it will be noticed that the English doctrine of the nature of mortgages, with slight modifications, prevails east of the Mississippi River everywhere, excepting New York alone in the north; a group of three states, Indiana, Michigan, and Wisconsin, in the west; and a group of three states, South Carolina, Georgia, and Florida, in the south; while west of the Mississippi, excepting only the states of Missouri and Arkansas, the doctrine everywhere prevails that a mortgage passes no estate or right of possession. This change from the common law rule may be traced to two sources: to the

views of the early jurists of New York, who adopted and carried to logical conclusions the opinions of Lord Mansfield; and to the civil law¹ established in Louisiana, under which a mortgage is merely a pledge, giving no right of possession. The influence of the civil law is seen in the codes of a few states; but the most potent influence in bringing about this change in the nature of mortgages in the new states and territories has come from their adoption to a large extent of the Code and judicial authorities of the State of New York. As to the nature of a mortgage, the civil law doctrine, and what may be called the equitable doctrine adopted in New York and the other states mentioned, are practically and essentially the same.

¹ "In the Roman law there were two sorts of transfers of property, as security for debts: namely, the *pignus* and the *hypotheca*. The *pignus*, or pledge, was when anything was pledged as a security for money lent and the possession thereof was passed to the creditor, upon the condition of returning it to the owner when the debt was paid. The *hypotheca* was when the thing pledged was not delivered to the creditor, but remained in the possession of the debtor. . . . It seems that the word *pignus* was often used indiscriminately to describe both species of securities, whether

applied to movables or immovables, . . . so that it answered very nearly to the corresponding term *pledge* in the common law, which, although sometimes used in a general sense to include mortgages of land, is, in the stricter sense, confined to the pawn and deposit of personal property. In the Roman law, however, there was generally no substantial difference in the nature and extent of the rights and remedies of the parties, between movables and immovables, whether pledged or hypothecated." 2 Story Eq. Jur. §§ 1005, 1006.

CHAPTER II.

FORM AND REQUISITES OF A MORTGAGE.

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1. *The Form Generally.*

60. No particular form is necessary to constitute a mortgage.¹ It must be in writing,² and must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect. Fulfilling these conditions, it is immaterial that the mortgage should be embraced in one instrument. As will be elsewhere noticed, a mortgage is frequently made by an absolute deed with a separate defeasance executed by the grantee; and an absolute deed with a defeasance resting in parol may be a mortgage also. In this chapter, however, it is proposed to treat of the form and requisites of a formal legal mortgage, or deed of trust.³

Georgia Code 1873, § 1955; *Burnside v. Terry*, 45 Ga. 621; *De Leon v. Higuera*, 15 Cal. 483; *Woodworth v. Guzman*, 1 Cal. 203; *Baldwin v. Jenkins*, 23 Miss. 206; *Mason v. Moody*, 26 Miss. 184.

Quoted with approval in *Harris v. Jones*, 83 N. C. 317, 321.

² *Porter v. Muller*, 53 Cal. 677.

² The following is a common form of a power of sale mortgage used in MASSACHUSETTS and other NEW ENGLAND states : —

KNOW ALL MEN BY THESE PRESENTS,
that in consideration of

paid by the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said [here follows description]. To have and to hold the granted premises, with all the privileges and ap-

purtenances thereto belonging, to the said
and heirs and assigns,
to their own use and behoof forever.

And hereby for and heirs, executors, and administrators, covenant with the grantee and heirs and assigns that lawfully seised in fee simple of the granted premises, that they are free from all incumbrances, that have good right to sell and convey the same as aforesaid; and that will, and heirs, executors, and administrators, shall warrant and defend the same to the grantee and heirs and assigns forever against the lawful claims and demands of all persons.

Provided, nevertheless, that if
or heirs, executors, administrators,
or assigns, shall pay unto the grantee or

The term "mortgage" has a technical signification at law, and is descriptive of an instrument having all the requisites necessary to establish it in a court of law, as distinguished from that which may be so regarded in a court of equity.¹ A mortgage which only a court of equity will recognize is properly designated an "equitable mortgage."

A formal mortgage differs from a warranty deed in a condition added, that if the grantor pay a certain sum of money, or perform other obligations named, then it shall be void. Other things besides the payment of the principal sum of money are usually made part of the condition, as for instance the payment of interest, of taxes upon the premises, of insurance upon any buildings there may be upon the land, together with a covenant against making or suffering waste.

A mortgage in some states usually contains also a power authorizing the mortgagee to sell upon the happening of any breach of the condition; but this is not an essential requisite of a mortgage, and will be treated of elsewhere.

61. Statutory forms. — The form of the granting part of the deed as well as the condition differs much in different parts of the country. In some states statutes have been enacted by which deeds and mortgages are reduced to the shortest possible forms; and statutory forms are given in some states, which are declared to be good and effectual.² All that is requisite to a good deed

executors, administrators, or assigns the sum of _____ in _____ years from this date, with interest semi-annually at the rate of _____ per cent. per annum, and until such payment shall pay all taxes and assessments on the granted premises; shall keep the buildings thereon insured against fire in a sum not less than _____ dollars, for the benefit of the grantee and executors, administrators, and assigns, at such insurance office as they shall approve, and shall not commit or suffer any strip or waste of the granted premises, or any breach of any covenant herein contained, then this deed, as also note of even date herewith, signed by _____ whereby _____ promise to pay to the grantee or order the said sum and interest at the times aforesaid, shall be void.

[For form of power of sale, see § 1778.]

And it is agreed that, until default in the performance of the condition of this

deed, and heirs and assigns may hold and enjoy the granted premises, and receive the rents and profits thereof.

And for the consideration aforesaid do hereby release unto the grantee and heirs and assigns all right of or to both dower and homestead in the granted premises.

In witness whereof the said _____ hereunto set _____ hand and seal this _____ day of _____ in the year one thousand eight hundred and seventy.

Signed, sealed, and delivered in presence of _____

¹ Walton v. Cody, 1 Wis. 420.

² Such forms exist in Illinois, R. S. 1877, c. 30, § 11; Indiana, 1 Rev. 1876, 364, § 15; Iowa, R. Code 1880, § 1970; Maryland, Code 1860, p. 143; Mississippi, R. Code 1880, § 1236; R. Code 1878, p. 393; Missouri, Wagner's Stat. 1870, p.

or mortgage may be expressed in a very few words. It was remarked by Coke, that if a deed of feoffment be without *premises, habendum, tenendum, reddendum*, clause of warranty, &c., it is still a good deed. "For if a man by deed give land to another and to his heirs without more saying, this is good, if he put his seal to the deed, deliver it, and make livery accordingly." ¹

By statute the legal tenor and effect of the different covenants may be, and in some states are, obtained simply by naming them without repeating the covenants themselves. In like manner the full effect of a power of sale may be had by simple reference in the mortgage to a statutory power,² instead of cumbering the record with the elaborate powers now in use. Attempts by legislation to bring about simplicity and brevity in legal forms have not always been successful; but much has been accomplished in this direction in some of the American States, making a practical return through this means to the simplicity of the ancient Saxons, who "in their deeds observed no set form, but used honest and perspicuous words to express the things intended with all brevity, yet not wanting the essential parts of the deed: as the names of the donor and donee; the consideration; the certainty of the thing given; the limitation of the estate; the reservation, and the names of the witnesses."³

62. A deed of trust to secure a debt is in legal effect a mortgage.⁴ It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time,

1416; Tennessee, Code 1858, § 2013; California, Civil Code 1872, § 2948; Dakota Territory, R. Codes 1877, § 1736.

¹ Chancellor Kent gives a very brief form of a deed, and observes: "But persons usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests, to make 'assurance double sure,' that generally, in important cases, the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance for a conveyance surrounded by the usual outworks, and securing respect and checking attacks by the formality of its manner, the prolixity of its provisions, and the usual redundancy of its language." 4 Kent Com. 461. He further says: "I apprehend that a deed would be perfectly competent, in

any part of the United States, to convey the fee, if it was to be to the following effect: I, A. B., in consideration of one dollar to me paid by C. D., do bargain and sell (or, in New York, grant), to C. D. and his heirs (in New York, Virginia, &c., the words, *and his heirs*, may be omitted), the lot of land [describe it]. Witness my hand and seal," &c.

² See §§ 1722, 1761.

³ Sir Henry Spellman's Works, by Bishop Gibson, p. 234.

⁴ Eaton v. Whiting, 3 Pick. (Mass.) 484; Woodruff v. Robb, 19 Ohio, 212; Sargent v. Howe, 21 Ill. 148; Newman v. Samuels, 17 Iowa, 528, 535; Lawrence v. Farmers' Loan & Trust Co. 13 N. Y. 200; Palmer v. Gurnsey, 7 Wend. (N. Y.) 248; Turner v. Watkins, 31 Ark. 429; Hurley v. Estes, 6 Neb. 386. See § 1769.

but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor.¹ The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage.² Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt. It passes the legal title to the grantee just as a mortgage does, except in those states where the natural effect of a conveyance is controlled by statute;³ and in states where a mortgage is considered merely as a security, and not a conveyance, a trust deed is apt to be regarded in this respect just like a mortgage.⁴ Both instruments convey a defeasible title only; and the right to redeem is the same in one case as it is in the other. The only important difference between them is, that in the one case the conveyance is directly to the creditor, while in the other it is to a third person for his benefit.

In Wisconsin, however, in consequence of a statute abolishing uses and trusts, except for certain purposes, a deed to a trustee conditioned that if the grantor does not pay a debt due from him to a third party, then the trustee shall advertise and sell the lands, pay the debt, and return the surplus money to the grantor, does not constitute a mortgage. The trustee is the mere agent of both parties, and such a trust being prohibited by the statute, the legal title remains in the grantor.⁵

Again, there is a well settled distinction between a deed of trust and a deed of trust in the nature of a mortgage; the one being for the trust purposes unconditional and indefeasible, while the other is conditioned and defeasible, in the same way that a mortgage is.⁶ The term deed of trust, however, as used in this treatise, has reference always to a conveyance in the nature of a mortgage. "A deed conveying land to a trustee as mere collateral security for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt in case of default on the part of the debtor, is a deed of trust in the nature of a mortgage. By an absolute deed of trust, the grantor parts absolutely with the title, which rests in the grantee uncon-

¹ *State Bank of Bay City v. Chappelle*, 40 Mich. 447.

² *Eaton v. Whiting*, *supra*; *Newman v. Samuels*, *supra*.

³ *Turner v. Watkins*, 31 Ark. 429.

⁴ As in *Kansas*, *Lenox v. Reed*, 12 Kans. 223, 227; in *Nebraska*, § 40. See, however, § 25, as to *Florida*.

⁵ *Marvin v. Titsworth*, 10 Wis. 320.

⁶ *Hoffman v. Mackall*, 5 Ohio St. 124.

ditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts; while the former is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance."¹

2. *The Formal Parts of the Deed.*

63. Parties described. — It is important that the names of the parties to a deed should be given accurately and fully. Persons accustomed chiefly to commercial transactions and forms sometimes neglect to observe this requirement, and use the initial only of the given name, and thereby needlessly introduce a new element of confusion and uncertainty into the record title. Parol evidence is admissible to show who was really intended as the grantee in a deed when the name is claimed to be erroneous, and there is a person of the name used in the deed.² It is not absolutely essential to the validity of a mortgage that a mortgagee be described by name, if there be such other description as will distinguish the person intended from all others; as for instance when the mortgage is made to the heirs at law of a person named who has deceased;³ but it would be void if made to the heirs of a person living, because it is then uncertain who are intended to have the benefit of the mortgage.⁴

But a mortgage "to the trustees" of an unincorporated association or society is good, although the trustees be not named.⁵ It is sufficient if they are so clearly described as to distinguish them from all others, so that there can be no uncertainty in the grant.

A mortgage to a corporation, by a name to which it was contemplated at the time to change the existing name of the company, is valid, if made to the corporation intended and it was then existing. In a proceeding upon the mortgage it should be averred that the mortgage was made to the company by the

¹ Per Bartley, J., in *Hoffman v. Mackall*, 5 Ohio St. 124.

² Thus a deed to "Hiram Gowing," was shown in this way to be intended for "Hiram G. Gowing," and not for his son, whose name was "Hiram Gowing." *Peabody v. Brown*, 10 Gray (Mass.), 45; and see *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 530.

As to the name of the grantor or mort-

gagor, his signature fixes the actual identity of the person.

³ *Shaw v. Loud*, 12 Mass. 447; and see *Thomas v. Marshfield*, 10 Pick. (Mass.) 364, 367.

⁴ *Hall v. Leonard*, 1 Pick. (Mass.) 27, 30.

⁵ *Lawrence v. Fletcher*, 8 Met. (Mass.) 153, 163.

name used, it being then known by that name, as well as by the name it was legally entitled to.¹

The designation of "junior" or "second" is no part of a man's name, and although convenient and desirable for the purpose of distinguishing the party from another person of the same name, it is not essential, and the person intended may be shown in some other way.² The description of a person by his occupation is an addition of the same character, though of less importance, because the terms used to describe the occupation are so general that they serve but little practical purpose in identifying the person.

When a party to the mortgage is a woman, it is important, if she be married, to give her husband's name, and if she be not married, to state that she is a "single woman" or a "widow."

It is usual and desirable to state the place of residence of the parties by naming not merely the town or city of such residence, but the county and state as well.

64. Generally, the consideration named in a mortgage is the actual amount of the debt secured by it. But it is not essential that this should be so. A nominal consideration named is sufficient, and in fact it is not essential that any consideration at all should be expressed. The real consideration is the debt or obligation which the mortgage is given to secure, and upon that depends the validity of the mortgage, so far as the consideration is concerned. The seal implies a consideration.

The amount of the debt secured is in no way fixed or controlled by the nominal consideration. The condition of the mortgage describes the debt and fixes the amount of it either specifically or in general terms.³ A mortgage to indemnify against a liability, or to secure future advances, is generally of the latter description, but even in these cases the nominal consideration is immaterial.

65. An accurate description of the premises is of great importance as affecting the value of the security, and oftentimes affecting as well the interest of the mortgagor, and of persons holding title under him. But a description, however general and indefinite it may be, if by extrinsic evidence it can be made practically certain what property it was intended to cover, will be

¹ *City Bank of Kenosha v. McClellan*, 21 Wis. 112.

² *Cobb v. Lucas*, 15 Pick. (Mass.) 7; *Kincaid v. Howe*, 10 Mass. 203.

³ *Miller v. Lockwood*, 32 N. Y. 293.

sufficient to sustain the lien.¹ A description by reference to other deeds is sufficient.² If a deed describe lands by metes and bounds, a reference for further description to other deeds recorded will convey additional land described in the deeds referred to, unless otherwise controlled.³ If a mortgage describes a definite quantity of land, another considerable tract of land, the title to which was derived from another source, is not covered by the mortgage, although the description concludes with a general reference to a deed which conveyed both tracts.⁴ If the mortgage clearly and unequivocally describes more land than is embraced in the deeds referred to, although the premises described are mentioned as "the same estate" mentioned in the deeds, the conveyance is not restricted by such reference to the premises described in the deeds referred to; but will also embrace the land described by metes and bounds.⁵

A mortgage of all the lots the mortgagor then owned in a certain town, whether he had the legal or equitable title thereto, conveys all the lots which can be identified as belonging to him by either title.⁶ But a mortgage of all the lands the mortgagor owns in a certain town does not include lands held by him in mortgage, though by absolute deed with a separate defeasance not recorded.⁷

A mortgage "of all my estate," or "of all my lands wherever situated," or "of all my property," is not invalid by reason of the generality of the description.⁸

When the objection is merely to the indefiniteness of descrip-

¹ § 1642; *Coogan v. Burling Mills*, 124 Mass. 390; *Tucker v. Field*, 51 Miss. 191; and see *Baker v. Bank of La.* 2 La. Ann. 371; *Whitney v. Buckman*, 13 Cal. 536; *De Leon v. Higuera*, 15 Cal. 483; *Hancock v. Watson*, 18 Cal. 137; *Began v. O'Reilly*, 32 Cal. 11; *Boon v. Pierpont*, 28 N. J. Eq. 7; *English v. Roche*, 6 Ind. 62; *Blakemore v. Taber*, 22 Ind. 466; *Morse v. Dewey*, 3 N. H. 535.

In Connecticut it is declared to be the policy of the law with regard to mortgages that they shall give definite information as to the property mortgaged; and it is intimated that a description which would be sufficient in an absolute deed might not be sufficient in a mortgage. *Herman v. Deming*, 44 Conn. 124. It is

doubtful if this case would be law anywhere else.

² *Wallace v. Furber*, 62 Ind. 103.

³ *Coogan v. Burling Mills*, *supra*.

⁴ *Holmes v. Abrahams*, 31 N. J. Eq. 415.

⁵ *Auburn Congregational Church v. Walker*, 124 Mass. 69.

⁶ *Starling v. Blair*, 4 Bibb (Ky.), 288. See *Easter v. Severin*, 64 Ind. 375.

⁷ *Mills v. Shepard*, 30 Conn. 98.

A mortgage of all "unappropriated" lands in a certain place may not cover lands which the mortgagor had previously conveyed, though the conveyance had not been recorded at the time of the mortgage. *Crawford v. Bonner*, 53 Tex. 194.

⁸ *Wilson v. Boyce*, 92 U. S. 320; *Usina v. Wilder*, 58 Ga. 178.

tion, it does not lie with the mortgagor to say that he conveyed the property by a description so loose or indefinite that no title could pass upon a foreclosure sale of the property.¹ If nothing passes, it is the misfortune of the mortgagee, but the mortgagor is not hurt; if anything does pass, the mortgagee is entitled to the benefit of the mortgage as it stands.² When, however, the description is such that property may pass or be sold under the mortgage which the mortgagor did not include, or intend to include, it is proper that he should ask to have it reformed. Very strong proof is required to support an allegation that by mistake a mortgage was made to embrace lands that ought not to have been put in; and the testimony of the mortgagor that he did not intend the mortgage should cover a portion of the premises described, which were in a condition to be mortgaged, and were deliberately included, is wholly insufficient to exclude such portion.³

If the description of the property in the granting part of a mortgage be inconsistent with a provision contained in the condition, the latter must give way.⁴

66. What uncertainty in description will invalidate.—The description may be so uncertain that no title will vest in the mortgagee by the deed, unless it be reformed;⁵ or even so uncertain that it cannot be reformed.⁶ A mortgage describing land by township and range, without stating in what county or state the land was situated, was held void.⁷ And so was a mortgage describing land as parts of different sections, without stating the township or range.⁸ But an error in the number of the range, or in the omission of it, will not affect the validity of a mortgage, if the property be otherwise described with such certainty as to clearly identify it.⁹

A mortgage of all the property of a mining company, particularly described as "located at and near the mouth of Alder Gulch, in section ten" of a certain township, does not cover property of said company located in other sections of that township;

¹ *Whitney v. Buckman*, 13 Cal. 536.

² *Tryon v. Sutton*, 13 Cal. 490.

³ *Shepard v. Shepard*, 36 Mich. 173.

⁴ *Donnan v. Intelligencer Printing & Publishing Co.* 70 Mo. 168.

⁵ *Peck v. Mallama*, 10 N. Y. 509; *Keifer v. Starn*, 27 La. Ann. 282; *White v. Hyatt*, 40 Ind. 385.

⁶ *Lewis v. Owen*, 64 Ind. 446.

⁷ *Cochran v. Utt*, 42 Ind. 267; *Murphy v. Hendricks*, 57 Ind. 593.

⁸ *Boyd v. Ellis*, 11 Iowa, 97.

⁹ *White v. Hermann*, 51 Ill. 243; *Kile v. Yellowhead*, 80 Ill. 208; *Thornhill v. Burthe*, 29 La. Ann. 639. As to whether the meridian or county controls, see *Sickmon v. Wood*, 69 Ill. 329.

and a decree authorizing the sale of property proved to be owned by the company in other sections is a nullity as regards such property. The only property that could be sold is that located in section ten.¹

A mortgage of fifty acres of land by description, the same being part of the large farm, or the next and adjoining fifty acres that is unincumbered, provided the first be incumbered, is not void for uncertainty as to either tract. The whole farm in such case is subject to the mortgage, which is to be satisfied out of any unincumbered tract, nearest to that first described; but the mortgage is not defeated although the whole farm be incumbered.²

A mortgage which does not name the town, county, or state in which the land is situated may nevertheless be rendered certain in the description of the premises by a reference to another deed, which contains a full and accurate description;³ or to the land of the adjacent owners,⁴ or by extrinsic evidence.⁵ A mistake in the number of a lot may be rendered immaterial by the boundaries which will control when fixed and certain, as for instance when they are public streets.⁶

67. The office of the habendum is to define the estate conveyed; to explain how long the grantee is to hold it, and whether in an absolute or qualified manner. To create an absolute and unqualified estate in the grantee the habendum must be to him and his heirs. A mortgage to one, "his executors, administrators, and assigns," without naming his heirs,⁷ or a mortgage to an individual, "his successors and assigns forever," without the word heirs,⁸ conveys only a life estate; and the executor of the mortgagee cannot maintain a writ of entry to foreclose the mortgage because it terminated with the mortgagee's life. A power of sale in such a mortgage, authorizing the mortgagee upon default to sell the land and execute a conveyance in fee simple, does not operate to enlarge the estate.

But a mortgage made to a treasurer of a corporation named, with habendum "unto him the said treasurer and his successors

¹ *Largy v. Sedman*, 3 Mon. 472.

² *Lee v. Woodworth*, 3 N. J. Eq. (2 Gr.) 36; and see *Kruse v. Scripps*, 11 Ill. 98; *Gray v. Stiver*, 24 Ind. 174.

³ *Robinson v. Brennan*, 115 Mass. 582; 137.

Slater v. Breese, 36 Mich. 77; *Boon v. Pierpont*, 32 N. J. Eq. 217. See, also, *Harding v. Strong*, 42 Ill. 148.

⁴ *Ells v. Sims*, 2 La. Ann. 251.

⁵ *Slater v. Breese*, *supra*.

⁶ *Cooper v. Bigly*, 13 Mich. 463.

⁷ *Clearwater v. Rose*, 1 Blackf. (Ind.)

⁸ *Sedgwick v. Laffin*, 10 Allen (Mass.), 430.

in office, to his and their use and behoof forever," the condition of the mortgage being that the mortgagor should "pay to the said treasurer, or his successors in office," a certain sum, is held to pass an estate in fee, on the ground that these expressions in the deed showed that the grantee took the conveyance simply as trustee for the corporation, and that the nature of the trust required that a fee should pass by the deed.¹ The estate of the trustee must be commensurate with the equitable estate of the *cestui que trust*. A mortgage to trustees for bondholders, from which words of inheritance have been inadvertently omitted, but the provisions of which require that the trustees should have an estate in fee simple in order to execute them, will be construed as a conveyance in fee simple, and may be reformed as against subsequent purchasers with notice; and the record of the mortgage would be notice that the instrument was intended to pass a fee.² But a mortgage to executors, "their successors and assigns," containing the usual clause conveying all the mortgagor's estate, right, and title, when duly recorded, is notice to subsequent purchasers, mortgagees, and judgment creditors, that such mortgage was intended to convey the fee.³

A mortgage giving the mortgagee a life estate only will not be reformed to convey a fee, as against the rights of a *bond fide* purchaser of the premises, without notice of any claim on his part of a greater estate than the mortgage as recorded purports to convey.⁴ Although mortgages of real estate are usually in fee, constructive notice merely of the existence of a mortgage, with no notice as to the estate intended to be conveyed, is not notice that the mortgage is in fee, when in terms a life estate only is expressed.

In a mortgage or other conveyance to a corporation it is usual to make the habendum to it and its "successors and assigns;" but neither of these words is necessary in a deed to a corporation aggregate to give it all the estate it can take in the land conveyed. There is an implied condition, in every conveyance to a corporation, that upon the civil death of the corporation while retaining the land it shall revert to the original grantor and his heirs.⁵

68. The covenants of a mortgage are usually those of a war-

¹ *Brooks v. Jones*, 11 Met. (Mass.) 191.

³ *Bunker v. Anderson*, 32 N. J. Eq. 35.

² *Randolph v. N. J. West Line R. R. Co.* 28 N. J. Eq. 49; *Coe v. N. J. Mid-*

⁴ *Wilson v. King*, 27 N. J. Eq. 374.

land Ry. Co. 31 N. J. Eq. 105.

⁵ 2 Kent Com. 282, 307.

ranty deed, and have the same effect and construction. If, however, a mortgage with covenants be given for purchase money of land conveyed to the mortgagor by a deed having like covenants, and the mortgagor is evicted, he may recover damages in an action for breach of the covenant, and the vendor who holds the mortgage is not allowed to set up the covenants in the mortgage deed as a defence by way of rebutter, especially when he holds the plaintiff's promissory notes secured by the mortgage.¹ "Various cases might be readily supposed," says Mr. Justice Dewey, "when such a defence ought not to prevail; as in cases of large payments advanced towards the purchase money, and a mortgage to secure only a small residue, and that, by the terms of the contract, to be paid at some remote future day. The rights of the defendant may be protected by postponing entry of judgment to await the set-off upon the mortgage debt."² In other words, the covenants in the mortgage do not estop the mortgagee to recover upon those in his vendor's deed to him. As between these

- parties, the mortgagor for purchase money really pledges nothing but the interest which he obtained under his vendor's deed, and is answerable to him for no imperfection in the title existing before the conveyance. If the mortgage be redeemed, that is the end of it; and if it be foreclosed, the title which the grantor
- parted with is restored to him by foreclosure, or he gets the full benefit of it. One having the mortgagee's right after foreclosure is not allowed to recover damages for a breach of the covenant which existed at the time of the conveyance by the mortgagee; for the effect of such recovery would be, to obtain all that he parted with in the conveyance, and the value of the incumbrance, which he is relieved from removing by the foreclosure.³

If upon the foreclosure of a mortgage not for purchase money the mortgagee purchase the property for the amount of the mortgage debt, he cannot afterwards maintain an action upon the covenants of warranty contained in the mortgage, without first having the sale and satisfaction of the judgment set aside.⁴

¹ Sumner v. Barnard, 12 Met. (Mass.) 459; Hubbard v. Norton, 10 Conn. 422; Haynes v. Stevens, 11 N. H. 28; Smith v. Cannell, 32 Me. 123.

² See Sumner v. Barnard, *supra*.

³ Smith v. Cannell, 32 Me. 123; Brown v. Staples, 28 Me. 497; Hardy v. Nelson, 27 Me. 525; Geyer v. Girard, 22 Mo. 159;

Connor v. Eddy, 25 Mo. 72; Lot v. Thomas, 1 Penn. (N. J.) 407. See, also, Hancock v. Carlton, 6 Gray (Mass.), 39, 61; Cross v. Robinson, 21 Conn. 379, 387; Kellogg v. Wood, 4 Paige (N. Y.), 578.

⁴ Todd v. Johnson, 51 Iowa, 192.

The covenants of warranty in a mortgage are often of importance where the mortgagor has no title, or an imperfect one, at the time of making the mortgage, but afterwards acquires one; they then operate by way of estoppel or rebutter, so that the after-acquired title enures to the benefit of the holder of the mortgage. Except in this way the ordinary covenants are of little use in a mortgage, because the damages for a breach of them would only entitle the holder of the mortgage to recover the amount due him on the mortgage, and this he can more readily recover by suit for the mortgage debt upon the note or bond, or upon the covenant for the payment of it sometimes contained in the mortgage.¹

3. *The Condition.*

69. The usual words of the proviso are, that upon the payment of the debt or performance of the duty named, "then this deed shall be void." But any equivalent expression may be used;² and in fact if it appear from the whole instrument that it was intended as a security, although there be no express provision that upon the fulfilment of the condition the deed shall be void, it is a mortgage.³ The substance and not the form of expression is chiefly to be regarded; and an enlarged and liberal view is to be taken of the instrument in order to ascertain and carry into effect the intention of the parties.⁴ It is not necessary that the condition of the mortgage should be so certain as to preclude the necessity of extraneous inquiry as to what it really is, and whether it has been performed;⁵ as in the case of a mortgage to secure future advances or to indemnify a surety. But unless it appears upon what event the deed is to become void, or that it is to become void in some event, it is not in itself a mortgage.⁶

70. Description of the debt secured. — To constitute a mortgage there must necessarily be a debt which is the subject of the security. But it is not necessary that there should be any personal liability for the payment of the debt: as in the case of a mortgage to secure advances to be made subsequently, the parties may agree that the mortgagee shall advance the money, and

¹ Quoted with approval in *Todd v. Lanfair v. Lanfair*, 18 Pick. (Mass.) 299; *Johnson, supra*. *Skinner v. Cox*, 4 Dev. (N. C.) L. 59.

² *Adams v. Stevens*, 49 Me. 362; *Cowles v. Marble*, 37 Mich. 158.

³ *Youngs v. Wilson*, 27 N. Y. 351.

⁴ *Snyder v. Bunnell*, 64 Ind. 403.

⁵ *Goddard v. Coe*, 55 Me. 385; *Adams v. Stevens*, 49 Me. 362; *Freeman's Bank*

⁶ *Steel v. Steel*, 4 Allen (Mass.), 417; *v. Vose*, 23 Me. 98.

rely solely for his security upon the pledge of the real estate.¹ Formerly, mortgages were frequently given for the security of existing debts without mentioning any note, bond, or other personal obligation. There can be no question as to their validity, not only as against the mortgagor, but against all claiming subsequently. Whether there can be any action against the mortgagor personally may depend upon the particular circumstances of different cases. Where there is a contract, express or implied, for the payment of the debt, this is not merged in the security created by the mortgage, and the creditor may maintain assumpsit.²

Literal exactness in describing the indebtedness is not required; it is sufficient if the description be correct so far as it goes, and full enough to direct attention to the sources of correct and full information in regard to it, and the language used is not liable to deceive or mislead as to the nature or amount of it.³ Thus, the condition of a mortgage specified that the mortgagee was an accommodation indorser and signer for the mortgagors on sundry notes, drafts, and bills of exchange, to the amount of \$50,000, which were then maturing; a particular description of which they were not able to give. The mortgagors were in a failing condition, and at the time the mortgages were given, it was necessary to give the security before a more accurate description could be made; but this description was held to be sufficient.⁴ Even a mortgage to secure all existing debts of the mortgagor to the mortgagee is not invalid for want of certainty in the amount secured.⁵

The condition of the mortgage must give reasonable notice of the incumbrance on the land mortgaged in order to affect the creditors of the mortgagor, who have no notice of the real incumbrance.⁶ It need not be so complete as to preclude extraneous inquiry concerning the liens on the property; but it must with reasonable certainty show what is the subject matter of the mortgage, and must so define the incumbrance that a fraudulent mortgagor may not substitute other debts and shield himself from the

¹ §§ 343-395; *South Sea Company v. 43 N. H. 239; Hurd v. Robinson, 11 Ohio Duncomb, 2 Stra. 919; Hickox v. Lowe, St. 232; Gill v. Pinney, 12 Ib. 38. 10 Cal. 197; Hodgdon v. Shannon, 44 N. H. 572.*

⁴ *Lewis v. De Forest, 20 Conn. 427.*

² *Yates v. Aston, 4 Ad. & El. N. S. 182.*

⁵ *Michigan Ins. Co. v. Brown, 11 Mich. 265; Machette v. Wanless, 1 Col. 225.*

³ *Ricketson v. Richardson, 19 Cal. 330; Booth v. Barnum, 9 Conn. 286; Sheafe v. Gerry, 18 N. H. 245; Gilman v. Moody,*

⁶ *Bacon v. Brown, 19 Conn. 33; Stoughton v. Pasco, 5 Conn. 442, 446; Merrills v. Swift, 18 Conn. 257, 264.*

demands of his creditors.¹ Where a mortgage described the debt as a note of \$1,000, which was never given, but the mortgagor was indebted to the mortgagee for goods to the amount of \$756, and the latter had agreed to furnish additional goods up to the sum of \$1,000, the mortgage so given as security for the whole was held void against an attaching creditor. The indebtedness actually existing could not be substituted for the indebtedness described.² But this is an extreme case and not to be relied upon.

71. The note and mortgage are construed together as if they were parts of one instrument, when they were made at the same time, and in relation to the same subject, as parts of one transaction constituting one contract.³ They explain each other so far as the indebtedness is concerned.⁴ The mortgage usually describes the note, stating the date, amount, the makers of it, and the time when it is payable. Such description serves to identify the note.⁵ The mortgage may describe the debt as well, and thus may qualify the terms of the note. For instance, where a note was given payable in five years from date, with interest at ten per cent., and at the same time a mortgage was given to secure the payment of the note, in which it was stipulated that the interest should be "payable annually," the agreement was held to be that interest at ten per cent. should be payable annually, and that foreclosure might be had for the non-payment of the interest.⁶ And so where the mortgage contained a stipulation that a general execution should not issue upon it, although a note accompanied the mortgage, it was held that the mortgagee could not recover a general judgment on the note, his remedy being limited to the property.⁷

Except in this way, the mortgage notes constitute no part of the mortgage. They are not essential to its validity. They need not be produced in evidence, in order to establish the mortgage title and right to possession. The mortgage itself is a conveyance of the estate, and the recital in the condition of the notes

¹ *Hubbard v. Savage*, 8 Conn. 215; 360; *Somersworth Savings Bank v. Rob. Pettibone v. Griswold*, 4 Conn. 158; erte, 38 N. H. 22; *Bassett v. Bassett*, 10 N. H. 64; *Boody v. Davis*, 20 N. H. 140. *Bramhall v. Flood*, 41 Conn. 68; *Stoughton v. Pasco*, 5 Conn. 442, 446; *Crane v. Deming*, 7 Conn. 387, 396; *Booth v. Barnum*, 9 Conn. 286, 290.

² *Bramhall v. Flood*, *supra*.

³ § 351; *Chick v. Willetts*, 2 Kans. 384; *Round v. Donnel*, 5 Kans. 54.

⁴ *Crafts v. Crafts*, 13 Gray (Mass.),

⁵ *Webb v. Stone*, 24 N. H. 282, 287; *Sheafe v. Gerry*, 18 N. H. 245, 248; *Robertson v. Stark*, 15 N. H. 109, 112.

⁶ *Muzzy v. Knight*, 8 Kans. 456; *Meyer v. Graeber*, 19 Kans. 165.

⁷ *Kennion v. Kelsey*, 10 Iowa, 443.

secured is an admission of their existence, and of the existence of the debt. For the purpose of establishing the title or right of possession, the mortgage alone without the notes is evidence of title and of the mortgage debt.¹

But upon the foreclosure of a mortgage it is necessary to produce the note if there be one; and if the note produced corresponds with the description in the mortgage as to date, amount, parties, rate of interest, and maturity, such correspondence, coupled with the possession of the note by the holder of the mortgage, raises a presumption of identity, and throws upon the mortgagor the burden of showing another note of like description.² Parol evidence is admissible to identify the note intended to be secured.³ When no note or bond accompanies the mortgage, a recital of indebtedness in the mortgage is sufficient evidence of the debt in a suit to foreclose it.⁴

72. Covenant for the payment of a debt. — Although it is essential that a mortgage should secure the payment of some debt, or the performance of some duty, yet it is not essential that it should contain any covenant to that effect,⁵ and it is not necessary that there should be any collateral or personal security for the debt secured.⁶ In such case, of course, the remedy of the mortgagee is confined to the land alone.⁷

The mortgages commonly used in this country refer to the debt only in the condition, and there merely by way of recital of the event upon which the deed is to be void. It is seldom that any express promise is made by the debtor in the mortgage to pay the debt; and no promise can be implied from the recital in the condition. It is provided by statute in several states that no such promise shall be implied in the mortgage.⁸

When there is an express covenant in the mortgage for the

¹ *Powers v. Patten*, 71 Me. 583, 586; *Smith v. Johns*, 3 Gray (Mass.), 517; *Mathews v. Light*, 40 Me. 394.

² *Jones v. Elliott*, 4 La. Ann. 303.

³ *Melvin v. Fellows*, 33 N. H. 401; *Prescott v. Hayes*, 43 N. H. 593.

⁴ *Whitney v. Buckman*, 13 Cal. 536; and see *Eyster v. Gaff*, 2 Col. 228.

⁵ See chapter ix; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Hickox v. Lowe*, 10 Cal. 197.

In mortgages by indenture a clause something like the following is sometimes inserted: —

"And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to pay unto the party of the second part, his executors, administrators, or assigns, the said sum of money and interest, as above mentioned and expressed in the condition of the said bond."

⁶ *Mitchell v. Burnham*, 44 Me. 286; *Smith v. People's Bank*, 24 Me. 185; *Brookings v. White*, 49 Me. 479.

⁷ *Weed v. Covill*, 14 Barb. (N. Y.) 242.

⁸ See § 678.

payment of the debt, the mortgagee may maintain an action at law upon it. He is not confined to his remedy by foreclosure suit.¹ "It seems to be generally admitted in the books," says Chancellor Kent, "that the mortgagee may proceed at law on his bond or covenant, at the same time that he is prosecuting on his mortgage in chancery."² Instead of pursuing both the remedy against the person and that against the thing, he may elect to pursue either one, and afterwards, if he has not obtained satisfaction, may follow the other.³

73. Interest is the thing the mortgage is made for when a loan of money has been made upon it, and the rate and time of payment are usually stated with care.⁴ Interest coupons are sometimes executed, payable at the several times when interest will be due upon the mortgage by its terms during the whole period it has to run. These are usually negotiable in form, and though detached from the mortgage note or bond are still secured by the mortgage.⁵ Interest is usually payable annually or semi-annually from the date of the mortgage. A provision for the payment of "interest annually on the first day of April in each year" makes the first interest due on the first day of April following the date of the mortgage, though its date be much later in the year.⁶

74. A mortgage debt made payable with interest, without naming the rate, bears interest at the rate fixed by law; and the law in force at the date of the instrument governs the rate.⁷ If

¹ *Brown v. Cascaden*, 43 Iowa, 103. The covenant was as follows: "And the said party of the first part (the mortgagor) covenants with the said party of the third part (the mortgagee), that he will pay the said mortgage money and interest on the days and times aforesaid." The court say that such a covenant is no part of the condition of the instrument, and in no way pertains to the conveyance of the land. "It is not a covenant securing the mortgagee against the failure of the title, or warranting possession or enjoyment of the land. It is simply an obligation binding the mortgagor to pay the money. We know of no rule of law which will invalidate such a covenant, when found in a mortgage." In *Newbury v. Rutter*, 38 Iowa, 179, the mortgagors recited that "we are justly indebted" in a sum named,

and "if from any cause said property shall fail to satisfy said debt, interest, and charges, we covenant and agree to pay the deficiency;" and there being no note for the debt, an action at law, without first foreclosing the mortgage, was sustained.

² *Dunkley v. Van Buren*, 3 Johns. (N. Y.) Ch. 330; § 1215.

³ *Vansant v. Allmon*, 23 Ill. 30; *Lichty v. McMartin*, 11 Kans. 565.

⁴ For the rates of interest allowed in the several states, see § 633.

⁵ For the law relating to the construction of coupons, their negotiability, their order of payment, overdue coupons, and suits upon coupons, see *Jones on Railroad Securities*, §§ 317-340.

⁶ *Cook v. Clark*, 3 Hun (N. Y.), 247; 5 *Thomp. & C.* 493; 68 N. Y. 178.

⁷ *Ackens v. Winston*, 22 N. J. Eq. 444.

the times when the interest shall be paid are not specified, but the language is such that some periodical payment is intended, it may be proved by parol evidence that the payments were to be made yearly, for instance, even as against a purchaser of the mortgaged premises.¹ The terms of the mortgage cannot be changed as against a purchaser, but he is subject to the agreement contained in the mortgage, and to such construction as may be required of what is ambiguous. The proof of the periods at which the interest is payable does not alter the instrument, but merely supplies what was omitted, and is necessary to its proper interpretation.

When the time of payment of the mortgage debt is definitely fixed, and the amount of it as well, interest is allowed from the date of the default, although not stipulated for in the mortgage or the note accompanying it. Interest follows in such case as an invariable legal incident of the principal debt.² But when the time of payment is uncertain, as for instance in case of a mortgage debt made payable at the decease of a third person, interest can be recovered only from the date of a demand of payment.³

The statutes of several states prescribe a rate of interest for contracts in which the parties have not agreed upon a rate, and for cases in which interest is given by law, but allow the parties to agree in writing for any rate of interest.⁴ Under such a provision the rate of interest agreed upon by the parties continues the same after the maturity of the obligation down to the time of rendering judgment upon it. The interest both before and after maturity is recoverable by virtue of the contract, as an incident or part of the debt.⁵ But although the weight of authority seems to favor this view, there are numerous authorities which hold that where the parties have not by special agreement fixed the rate at which the interest shall run after maturity, the

¹ *Ackens v. Winston*, *supra*. The language was, "within sixty days from the time it becomes due, at any time during the ten years." This is sufficient to put a purchaser upon inquiry as to the periods of payment.

² *Spencer v. Pierce*, 5 R. I. 63.

³ *Gardiner v. Woodmansee*, 2 R. I. 538.

⁴ See § 633.

⁵ *Brannon v. Hursell*, 112 Mass. 63; *Cromwell v. County of Sac*, 96 U. S. 51; *Beckwith v. Hartford, Prov. & Fishkill R.*

R. 29 Conn. 268; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Etnyre v. McDaniel*, 28 Ill. 201; *Pruyn v. City of Milwaukee*, 18 Wis. 367; *Hand v. Armstrong*, 18 Iowa, 324; *Kohler v. Smith*, 2 Cal. 597; *McLane v. Abrams*, 2 Nev. 199; *Hopkins v. Crittenden*, 10 Tex. 189.

For English cases see *Gordillo v. Weguelin*, L. R. 5 Ch. D. 287; *Morgan v. Jones*, 8 Ex. 620; *Price v. Great Western Ry. Co.* 16 M. & W. 244.

rate fixed for cases where the parties have not agreed upon a rate prevails. The interest after maturity is regarded as recoverable, not upon the contract but upon the provisions of the statute.¹

75. The time of payment of the debt secured should be fixed, so that it may be known with certainty when a default occurs. If no time of payment be named, the debt is payable upon demand, and suit may be brought to enforce both the debt and the mortgage immediately. When the time of payment is fixed by the mortgage or the note secured by it, the mortgagor is not entitled to any notice of it.² Grace is to be allowed in computing the time of payment of a mortgage note, or of any instalment of it, payable at a day certain, in the same manner as upon a note not secured by mortgage.³ It is allowed also upon an instalment of interest falling due at the same time with the principal or any instalment of the principal. But on an instalment of interest alone, falling due when no part of the principal becomes due, the debtor is not entitled to days of grace.⁴

The usual form of power of sale mortgage in use in Massachusetts and other New England states provides,⁵ that upon a sale of the premises under the power the mortgagee may, out of the money arising from the sale, "retain all sums then secured by this deed, whether then or thereafter payable." This provision in effect makes the whole mortgage payable upon any default which authorizes the exercise of the power of sale, if he in fact does exercise the power; and in the form in common use the condition is for the payment of the principal, instalments, and interest at the times named, as also the taxes and insurance, and upon any breach of the condition the mortgagee may proceed to foreclose.

Of course in such case the right to receive payment of sums not due arises only upon a sale. And so when a trustee in a trust deed is empowered to sell the property when the first instalment falls due, and all the indebtedness is to be considered as

¹ *Brewster v. Wakefield*, 22 How. 118; *Pearce v. Hennessey*, 10 R. I. 223; *Eaton v. Boissonnault*, 67 Me. 540; *Lash v. Lambert*, 15 Minn. 416; *Searle v. Adams*, 3 Kans. 515; *Rilling v. Thompson*, 12 Bush (Ky.), 310; *Langston v. S. C. R. Co.* 2 S. C. 248; *Virginia v. Chesapeake & Ohio Canal Co.* 32 Md. 501. See, for discussion

of some of these cases, *Jones on Railroad Securities*, § 336.

² *Ing v. Cromwell*, 4 Md. 31.

³ *Coffin v. Loring*, 5 Allen (Mass.), 153.

⁴ *Macloon v. Smith*, 49 Wis. 200; *National Bank of N. A. v. Kirby*, 108 Mass. 497.

⁵ § 1778.

matured upon the first default, for the purpose of the application of the trust fund, the indebtedness not then due cannot be considered as matured, so that a personal judgment can be rendered for it.¹

76. A stipulation that the whole sum shall become due and payable upon any default in the payment of any part of the principal or interest is universally held to be legal and valid. It is not objectionable as being in the nature of a penalty or forfeiture.²

In some states such a provision is so usual, that authority to an agent or officer to execute a mortgage, the terms and conditions of which are not specified, would authorize him to insert this provision; while in other states special authority to use this provision is necessary. His general authority only authorizes the use of the terms and provisions ordinarily inserted, and therefore implied by the term mortgage. But the unauthorized use of this provision would not invalidate the mortgage in other respects.³

If the provision be that the mortgagee may upon default, or after the default has continued a certain time, elect that the whole amount of the debt shall become payable, the mortgagee, after the happening of this contingency, cannot be compelled to accept the interest or instalment due, and yield his claim for the whole amount.⁴ In such case courts of equity have no power to

¹ *Mason v. Barnard*, 36 Mo. 384.

² § 1181; *Steel v. Bradfield*, 4 Taunt. 227; *James v. Thomas*, 5 B. & Ad. 40; *Mobray v. Leckie*, 42 Md. 474; *Schooley v. Romain*, 31 Md. 574; *Kramer v. Rebman*, 9 Iowa, 114; *Robinson v. Loomis*, 51 Pa. St. 78; *Stanclift v. Norton*, 11 Kans. 218; *First Nat. Bank v. Peck*, 8 Kans. 660; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336; *Hale v. Gouverneur*, 4 Edw. (N. Y.) 207; *Noyes v. Clark*, 7 Paige (N. Y.), 179; *Ferris v. Ferris*, 28 Barb. (N. Y.) 29; *Valentine v. Van Wagner*, 37 Barb. (N. Y.) 60; *Crane v. Ward, Clarke's* (N. Y.) 393.

The following is a form of the interest clause frequently used:—

"It is thereby expressly agreed, that, should any default be made in the payment of the said interest, or of any part thereof, on any day whereon the same is

made payable, as above expressed; and should the same remain unpaid and in arrear for the space of days, then, and from thenceforth,—that is to say, after the lapse of the said days,—the aforesaid principal sum of dollars, with all arrearage of interest thereon, shall, at the option of the said party of the second part, his executors, administrators, or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything thereinbefore contained to the contrary thereof in anywise notwithstanding, as by the said bond or obligation, and the condition thereof, reference being thereto had, may more fully appear."

³ *Jesup v. City Bank of Racine*, 14 Wis. 331.

⁴ For construction of interest clauses, see §§ 1179-1186.

relieve against the default and its consequences.¹ It is no ground for such relief that the mortgagor was unable to find the holder of the mortgage until the time of payment had passed.² Of course there would be relief if the payment was prevented by fraud on the part of the mortgage creditor.

It is not essential that the interest clause or option clause, as it is sometimes called, should be contained in the note or bond as well as the mortgage, to make it effectual, inasmuch as both instruments are to be construed together.³

77. Payment of taxes.—The mortgage usually provides by way of covenant or condition that the mortgagor shall pay all taxes and assessments levied upon the premises.⁴ The payment of the taxes thus becomes as obligatory upon the debtor as the payment of the mortgage debt; and upon his failure to pay them, the mortgagee may pay them and have the amount included in any judgment that he may afterwards obtain upon the mortgage. Sometimes the mortgage provides that such taxes, when paid by the mortgagee, shall become a part of the mortgage debt; but without such provision the amount so paid in fact becomes a lien under the mortgage.⁵ A provision that the mortgagee may retain from the proceeds of a sale under the mortgage all charges and expenses incurred by reason of any failure of the mortgagor to perform the condition and covenants of the mortgage, includes payments for taxes and the like.

A stipulation in a mortgage, that upon a failure to pay the taxes levied upon the premises, the principal debt shall become immediately due and payable, is valid. It is similar to the provision very common in mortgages, and generally sustained, that the principal shall become due on a failure to pay the interest promptly.⁶

This covenant cannot be enforced after the debt is discharged.

¹ *Malcolm v. Allen*, 49 N. Y. 448; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Broderick v. Smith*, 26 Ib. 539; S. C. 15 How. Pr. 434; *Valentine v. Van Wagner*, 37 Barb. (N. Y.) 60; S. C. 23 How. Pr. 400; *Hale v. Gouverneur*, 4 Edw. (N. Y.) 207; *Ferris v. Ferris*, 28 Barb. (N. Y.) 29; S. C. 16 How. Pr. 102; *Bennett v. Stevenson*, 53 N. Y. 508.

² *Dwight v. Webster*, 32 Barb. 47; S. C. 19 How. Pr. 349.

³ *Schoonmaker v. Taylor*, 14 Wis. 313.

⁴ It is, in Maryland, provided by statute

that there may be such a covenant. Pub. Gen. Laws 1860, art. 64, § 4.

⁵ See §§ 358, 636, 1134, 1597, and also *Stanclift v. Norton*, 11 Kans. 218.

This decision had reference to a statute then in force declaring that taxes so paid should be a lien on the land; but the court declare that without the statute the mortgagee would probably have this right, in order to keep his security perfect. And see *Sharp v. Barker*, 11 Kans. 381.

⁶ *Stanclift v. Norton*, 11 Kans. 218.

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It expires with the mortgage. The effect upon the covenant is the same whether the mortgagor voluntarily pays the mortgage debt, or whether it is paid by the mortgagee's buying in the mortgaged premises at a foreclosure sale. If, therefore, the mortgagee purchase at the sale for less than the debt, and the deficiency be paid by the mortgagor, he cannot afterwards be compelled to pay to the mortgagee the amount the latter has been obliged to pay to redeem the premises from sales for taxes assessed while the mortgage was in force. The covenant to pay taxes, being part and parcel of the mortgage, expires with it.¹

78. *Insurance.* — It is usually a condition of the mortgage also that the mortgagor shall keep the buildings upon the mortgaged premises insured against fire in a certain sum for the benefit of the mortgagee at such insurance office as he may approve.² A breach of this condition, or of the condition to pay taxes assessed upon the premises, is as effectual in giving the mortgagee a right to enforce his mortgage as is a breach of the condition to pay an instalment of interest or principal, or the whole principal debt.

4. *Special Stipulations.*

79. *Special provisions* of various kinds to suit the convenience of the parties may be inserted in the mortgage. Among those most frequently used is a provision that upon making certain payments the mortgagor shall be entitled to have certain portions of the mortgaged premises released from the operation of the mortgage; or a provision that the mortgagor may pay the whole or a part of the debt at his option before the time fixed for the payment of it. A provision in a mortgage, reserving to the mortgagor "the right to pay all, or any part of said indebtedness, at any time during the present year, in current paper funds," does not restrict him to a single payment of the entire amount due, but authorizes partial payments at different times during the year; and the mortgage having been made in Alabama during the rebellion, payments were authorized, in treasury notes of the Confederate States, notwithstanding their great depreciation.³

A stipulation for partial releases of lots embraced in the mortgage upon the payment of stipulated sums, "provided that the

¹ *Hitchcock v. Merrick*, 18 Wis. 357.

² *Stalworth v. Blum*, 41 Ala. 319.

³ See chapter xviii., on "INSURANCE."

covenants and conditions of said mortgage shall be faithfully kept and performed" by the mortgagor, can be enforced only upon strict performance of the conditions, and making all payments of principal and interest as they become due. Such a covenant running only to the mortgagor, without mention of his assigns, is personal in character, and cannot be enforced by a purchaser from him.¹ A stipulation that in case the mortgagor should be able to sell the premises or mortgage them to another, so as to pay off the mortgage debt, the mortgagee should reconvey to him, so as to enable him to carry out the transaction, does not confer upon him a power of sale, for he had that already, but operates as a covenant to reconvey for the purpose named.² A reservation by a mortgagor of "the privilege of selling said land at any time, and to appropriate the proceeds first to the payment of the mortgage debt," enables him to contract for a sale of the land, and to compel the mortgagee to credit the proceeds upon the debt. But while the mortgagor has no power, either to convey the land or to receive the proceeds of a sale of it, the mortgagee is bound to make the proper conveyance and to receive and credit the proceeds.³

80. Mortgagor's possession. — The provision, now almost universally inserted in mortgages, that until default in the performance of the condition of the deed the mortgagor may hold the premises, was formerly exceptional.⁴ In 1819, Chief Justice Parker said that such a provision was seldom seen in Massachusetts.⁵ In another case in this state the same year the court say, that although parties intend that the mortgagor shall remain in possession, yet they go on making mortgages without any covenant respecting the possession.⁶ Evidence of the intention of the parties, or of their agreement at the time of making the mortgage, that the mortgagor should continue in possession until he should fail to perform the condition, cannot be received to control the settled rule of law, that without such provision the mortgagee is entitled to immediate possession.

¹ *Pierce v. Kneeland*, 16 Wis. 672.

For construction of other provisions for release of portions of the property, see *Brigham v. Avery*, 48 Vt. 602.

² *Coffing v. Taylor*, 16 Ill. 457.

³ *Frierson v. Blanton*, 1 Bax. (Tenn.) 272.

⁴ § 667.

⁵ *Smith v. Dyer*, 16 Mass. 18, 24.

⁶ *Colman v. Packard*, 16 Mass. 39, 40.

In Massachusetts it is provided that the statutes relating to foreclosure shall not prevent the mortgagee's entering on the premises or recovering possession before breach of the condition, when there is no agreement to the contrary, but in such case he must account for the rents and profits. Gen. Stat. c. 140, § 9.

§§ 81, 82.] FORM AND REQUISITES OF A MORTGAGE.

But although the mortgagor's right of possession be not expressly provided for, he is entitled to it, if the condition of the mortgage be such as to imply his possession for the purpose of performing it.¹ When the mortgagor's right of possession is provided for, or necessarily implied, the mortgagee cannot enter until default, and cannot, until he has made actual entry or brought suit for possession, give any one else the right to occupy, and exclude the owner of the equity.²

5. *Execution and Delivery.*

81. Sealing is a formality essential to the execution of any legal conveyance of real estate. In some states it is provided by statute that a scroll may be used in place of a seal, but this unseemly substitute for the ancient formality is only another formality none the less requisite.³ A mortgage executed without a seal, except in a few states where it is not required, is not a legal mortgage. In equity it amounts to a compact for a mortgage, and as such creates no lien as against purchasers from the mortgagor, or as against his creditors, or even against an assignee under a general assignment for the benefit of creditors.⁴

Signing is the act which imparts life to the deed. Although the most essential thing of all in the execution of the deed, it is a matter so much of course that it hardly need be mentioned among the requisites. A mortgagor is bound by a signature of his name made by another person in his presence and by his direction. If his name be subscribed by another in his absence, he may adopt the signature as his own.⁵ His acknowledgment of the deed is a sufficient recognition of it.⁶

82. Witnesses. — The statutes of several states provide that mortgages and other conveyances of real estate shall be attested

¹ §§ 389, 668, 702; *Wales v. Mellen*, 1 Gray (Mass.), 512, and cases cited; *Clay v. Wren*, 34 Me. 187.

² *Silloway v. Brown*, 12 Allen (Mass.), 30.

³ See § 531.

Chancellor Kent says: "Whether land should be conveyed by writing, signed by the grantor only, or by writing signed, sealed, and delivered by the grantor, may be a proper subject for municipal regulation. But to abolish the use of seals by the substitute of a flourish of the pen, and

yet continue to call the instrument which has such a substitute a deed, or writing sealed and delivered, within the purview of the common or the statute law of the land, seems to be a misnomer, and is of much more questionable import." 4 Com. 453.

⁴ *Erwin v. Shuey*, 8 Ohio St. 509; *Bloom v. Noggle*, 4 Ib. 45.

⁵ *Fouch v. Wilson*, 59 Ind. 93. As to what is a sufficient signing, see *Zann v. Haller*, 71 Ind. 136.

⁶ *Bartlett v. Drake*, 100 Mass. 174.

by witnesses, two being required in some states, one in others, and in still others none at all;¹ but this requirement, like that for the acknowledgment of deeds, has reference chiefly to the recording of them, and does not affect the validity of the instruments as between the parties if not observed.² Although a mortgage defectively executed in this respect is not a legal mortgage, it may be enforced in equity.³

83. An acknowledgment is essential in order to admit a deed to record, but is not otherwise necessary as between the parties. This subject being fully treated of elsewhere, it is introduced here with special reference to stating that before the deed is acknowledged the execution of it must be complete in every other respect.⁴ The acknowledgment is the final act before the delivery of the deed, and must be made of a completed deed. There can be no valid acknowledgment of a mortgage until all material parts of the instrument are written in, such for instance as the name of the grantee, and the amount of the lien.⁵

This rule applies with particular force to acknowledgments made by married women, where the law protects them by requiring a separate examination by the magistrate who takes the acknowledgment.⁶ In a case where a wife so acknowledged an instrument intended to be a mortgage of her separate lands, while there were blanks for the insertion of the mortgagee's name and the sum borrowed, it was urged that she should be estopped from denying that she had signed and acknowledged the mortgage. But Mr. Justice Nelson said: "The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into law an entirely new system of conveyances of the real property of *feme coverts*. Instead of the transaction being a real one in conformity with established law, conveyances, by signing and acknowledging blank sheets of paper, would be the only formalities requisite. . . . The difficulty here is not in the form of the acknowledgment, but that it applied to a nonentity, and was, therefore, nugatory. The truth is, that the acknowledgment in

¹ See § 532.

² *Gardner v. Moore*, 51 Ga. 268.

³ *Lake v. Doud*, 10 Ohio, 415.

⁴ See § 533.

⁵ *Drury v. Foster*, 2 Wall. 24.

⁶ *Drury v. Foster*, *supra*. Followed in *McQuie v. Peay*, 58 Mo. 56.

this case might as well have been taken and made on a separate piece of paper, and at some subsequent period attached by the officer, or some other person, to a deed that had never been before the *feme covert*."

84. A delivery and acceptance of the mortgage are essential to its validity. If not delivered directly to the mortgagee or his agent, but to a third person not authorized to act for him, it is essential to show the subsequent acceptance of it by the mortgagee, or else to show notice to him of the existence of the mortgage, and such additional circumstances as will afford a reasonable presumption of his acceptance of it. Such presumption, as against others who may acquire an interest in the property, does not arise merely from the fact that the mortgage would be beneficial to him.¹ Until there be something more to show the grantee's acceptance, the presumption of it exists only for his benefit as against the grantor, his heirs, devisees, and ordinary creditors.² The possession of the deed by the mortgagee is presumptive evidence of his acceptance of it.³ Proceedings by him to enforce the title, or his release of it, are conclusive of his acceptance.⁴

Without delivery there is no mortgage.⁵ It takes effect only from the time of its delivery.⁶ That a mortgage has been recorded raises no presumption of its delivery to the mortgagee against his denial of it. An actual delivery is not necessary, but there must be some act which in legal contemplation is equivalent to this.⁷ A subsequent attempt by the mortgagee to enforce the mortgage may be relied upon to show an acceptance as between the parties.⁸

Delivery may be made to an agent. When the mortgage is to a corporation, a delivery to any officer or attorney who customarily acts for it in such matters is sufficient.⁹ An agent authorized to sell land is authorized to accept delivery of a mortgage in part payment of the purchase money, unless it clearly appears that it

¹ *Bell v. Farmers' Bank of Ky.* 11 Bush (Ky.), 34; *Tuttle v. Turner*, 28 Tex. 759; *Evans v. White*, 53 Ind. 1; *Freeman v. Peay*, 23 Ark. 439; *Ruckman v. Ruckman* (C. C. N. J. 1881), 6 Fed. Rep. 225.

² *Bell v. Farmers' Bank of Ky.* *supra*.

³ *Chandler v. Temple*, 4 Cush. (Mass.) 285; *Wolverton v. Collins*, 34 Iowa, 238.

⁴ *Ely v. Stannard*, 44 Conn. 528; *Crocker v. Lowenthal*, 83 Ill. 579.

⁵ *Croft v. Bunster*, 9 Wis. 503; *Freeman v. Peay*, 23 Ark. 439; *Hoadley v. Hadley*, 48 Ind. 452; *Houfes v. Schultze*, 2 Bradw. (Ill.) 196. See § 539.

⁶ *Milliken v. Ham*, 36 Ind. 166.

⁷ *Foley v. Howard*, 8 Iowa, 56.

⁸ *Aldrich v. Willis*, 55 Cal. 81.

⁹ *Patterson v. Ball*, 19 Wis. 243.

was delivered to him for some other purpose.¹ A delivery of a trust deed to the *cestui que trust* is a sufficient delivery to the trustee. His acting under the trust by advertising the property for sale is an acceptance of the trust by him, although he may not have had possession of the deed.²

The fact of delivery may be shown by other writings of the parties, in which reference is made to the mortgage as an existing security; or by their subsequent acts with reference to it.³

If it appear that a note and mortgage have been executed and left where the mortgagee could readily obtain wrongful possession of them and negotiate them, the maker's negligence might prevent his setting up the defence that they have no legal existence.⁴

85. A subsequent acceptance by the mortgagee of a mortgage delivered to the recording officer, or to an unauthorized third person, gives effect to it from the time of the first delivery, as between the parties to it; but as to persons who have acquired title to the property, or an interest in it, or lien upon it, through or under the mortgagor before the time of the actual acceptance of the deed by the mortgagee, the subsequent acceptance gives effect to the deed only from the time of such acceptance.⁵ In the mean time an attachment of the property as belonging to the grantor,⁶ or a judgment lien upon his property, will prevail.⁷ The acceptance cannot relate back so as to defeat the intervening lien.⁸

When a mortgage has been executed and tendered in compliance with an agreement of a debtor to make a mortgage, and the creditor refuses to accept the mortgage as a compliance with the agreement, and directs his agent to procure a mortgage that will meet the terms of the agreement, the creditor cannot afterwards accept the mortgage without the debtor's consent.⁹

It is sufficient proof of the delivery of a mortgage that it was filed for record by the mortgagor, and was afterwards found in the mortgagee's possession.¹⁰ The subsequent acceptance of it ratifies the act and gives it effect from the time it was filed for record.¹¹

¹ *Akerly v. Vilas*, 21 Wis. 88. See § 539.

² *Crocker v. Lowenthal*, 83 Ill. 579.

³ *Truman v. McCollum*, 20 Wis. 360; *Renken v. Bellmer*, 55 Cal. 466.

⁴ See *Tisher v. Beckwith*, 30 Wis. 55; S. C. 11 Am. Rep. 546.

⁵ §§ 540, 541.

⁶ *Bell v. Farmers' Bank of Ky.* 11 Bush (Ky.), 34.

⁷ *Woodbury v. Fisher*, 20 Ind. 387.

⁸ *Goodsell v. Stinson*, 7 Blackf. (Ind.) 437.

⁹ *Adams v. Johnson*, 41 Miss. 258.

¹⁰ *Haskill v. Sevier*, 25 Ark. 152; *Carnall v. Duval*, 22 Ark. 136.

¹¹ *Carnall v. Duval*, *supra*.

§§ 86, 87.] FORM AND REQUISITES OF A MORTGAGE.

86. A mortgage made for the purpose of being sold is not a lien in the mortgagee's hands as against subsequent purchasers or lien creditors, except from the time the advances are actually made upon it, either by the mortgagee or his assignee. An engagement on the part of the mortgagee, or another, to advance the money in the future, would be a consideration for the making of it sufficient to support it against other liens from the time of its delivery and record. An assignee with notice that the mortgage was originally given without consideration, for the purpose of raising money by a subsequent sale, is put upon inquiry as to whether there were any liens intervening between its date and his purchase. The fact that the mortgagor negotiates the sale of the mortgage is a circumstance that should put the purchaser upon inquiry.¹

Where a mortgage is made for the purpose of raising money for the mortgagor, and is recorded without any delivery to the nominal mortgagee, and before it is assigned and delivered to one who subsequently buys it another person acquires a lien upon the mortgaged premises, the latter has priority. The mortgage in such case has life and validity only from the time of its assignment and delivery to the assignee for value; and it can have no retroactive operation so as to prejudice others who have acquired rights in the mean time. It is immaterial in this respect that the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgagee advanced the whole sum of principal secured by the mortgage without abatement, and that there was no off-set, or defence to it.²

87. A delivery in escrow is sufficient, and the fact that the depositary was at the time an agent of the mortgagee, or where the mortgagee is a corporation the fact that he was then a director of it, does not prevent his holding in escrow.³

A mortgage and note placed in the hands of a third person, to be delivered to the mortgagee upon the happening of a certain event, and delivered by him without authority, without waiting for such event, are invalid, and cannot be enforced even by a *bond fide* holder for value.⁴ There is in such case no delivery of the note and mortgage, and they have never had a legal existence. A promissory note, although it be negotiable, can have no legal

¹ Mullison's Estate, 68 Pa. St. 212.

² Schafer v. Reilly, 50 N. Y. 61.

³ Andrews v. Thayer, 30 Wis. 228.

⁴ Chipman v. Tucker, 38 Wis. 43, and cases cited; S. C. 20 Am. R. 1.

inception without a delivery of it, and the rules of commercial paper do not apply in such case; these can operate only after the paper has a valid existence. As in the case of a forged note, or of one purloined from the maker, the inquiry goes back of all considerations of negotiability, and the effect of that, to the existence of the paper as a legal obligation. A mortgage without consideration, deposited to await the performance of conditions which would make a consideration for it, cannot be made operative by a fraudulent delivery before the performance of the conditions, and without the mortgagor's consent. The mortgage in such case never becomes operative at all. It is void from the beginning.¹

88. Acceptance of *cestui que trust* presumed. — In the execution of a trust deed to secure a debt it is not necessary that the *cestui que trust* should sign it, or in any way assent to it in writing.² The deed passes the legal title as soon as it is executed by the grantor and trustee, and can be avoided only by the dissent, express or implied, of the creditor.

89. The date. — A mortgage is not invalid, although it is not dated, or has a false date, or an impossible one, as, for instance, February 30th, provided the real day of its date or delivery can be proved. The date, being no part of the substance of the deed, may be contradicted. The true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the deed or by record.³ It is said that there is a presumption that a mortgage was executed and delivered on the day of its date, arising from the due execution, acknowledgment, and record of it.⁴ The date of the acknowledgment, together with other circumstances appearing upon the face of the deed, may be sufficient to rebut this inference.⁵ If the date of the mortgage be later than that of the acknowledgment, it may be shown that the date of the acknowledgment is erroneous, and that the mortgage was not acknowledged until after it was executed.⁶

¹ Powell v. Conant, 33 Mich. 396. See Barson v. Huntington, 21 Mich. 415; Andrews v. Thayer, 30 Wis. 228.

² Skipwith v. Cunningham, 8 Leigh (Va.), 271.

³ Parke v. Neeley 90 Pa. St. 52.

⁴ Lyon v. McIlvaine, 24 Iowa, 9; Savery v. Browning, 18 Iowa, 246; Parke v. Neeley, *supra*.

⁵ Parke v. Neeley, *supra*.

⁶ Hoit v. Russell, 56 N. H. 559.

6. *Filling Blanks, Making Alterations, and Reforming.*

90. The filling of blanks after execution. — A blank form of mortgage signed and acknowledged, and afterwards filled up in the signer's absence by another person without written authority, so as to make it a mortgage on land owned by the person signing the paper, is not a deed in writing valid to pass an estate in land under the statute of frauds.¹ The ancient doctrine of the common law, as stated in Sheppard's Touchstone,² is, that "Every deed well made must be written; i. e. the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This remains the law in England,³ and is generally supported by the authorities in this country.⁴

¹ Ayres v. Probasco, 14 Kans. 175, and cases cited.

² Page 54.

³ Hibblewhite v. M'Morine, 6 M. & W. 200; Davidson v. Cooper, 11 M. & W. 778, 793. These cases distinctly overrule Texira v. Evans, cited and stated by Wilson, J., in Master v. Miller, 1 Anstr. 225, as follows: Evans wanted to borrow £400, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond; Texira lent £200 on it, and the agent accordingly filled up the blanks with that sum and Texira's name, and delivered the bond to him. On *non est factum*, Lord Mansfield held it a good deed.

⁴ The doctrine that written authority is requisite for the filling up of material blanks in a deed after execution is declared in:—

Arkansas: Cross v. State Bank, 5 Ark. 525.

California: Upton v. Archer, 41 Cal. 85.

Georgia: Ingram v. Little, 14 Ga. 173.

Illinois: People v. Organ, 27 Ill. 27; Chase v. Palmer, 29 Ill. 306; Whitaker v. Miller, 83 Ill. 381; Wilson v. South Park Commissioners, 70 Ill. 46; McNab v. Young, 81 Ill. 11.

Indiana: Richmond Manufacturing Co. v. Davis, 7 Blackf. (Ind.) 412.

Kansas: Ayres v. Probasco, 14 Kans. 175.

Kentucky: Cummins v. Cassily, 5 B. Mon. 74.

Maine: South Berwick v. Huntress, 53 Me. 89, where many cases are cited.

Maryland: Byers v. McClanahan, 6 Gill & J. 250.

Massachusetts: Burns v. Lynde, 6 Allen, 305.

Mississippi: Williams v. Crutcher, 5 How. 71.

North Carolina: Graham v. Holt, 3 Ired. L. 300.

Ohio: Ayres v. Harness, 1 Ohio, 368.

Tennessee: Gilbert v. Anthony, 1 Yerg. 69; Mosby v. State of Ark. 4 Sneed, 324.

Virginia: Preston v. Hull, 23 Gratt. 600.

But the authority of Texira v. Evans has been adopted by some authorities in this country: *Ex parte Kerwin*, 8 Cow. (N. Y.) 118; Chauncey v. Arnold, 24 N. Y. 330, where the earlier cases in New York are cited; and although the doctrine of Texira v. Evans is spoken of by Mr. Justice Smith as the settled doctrine in that state, yet Mr. Justice Denio speaks with apparent approval of the English cases overruling the "looser doctrine" of

FILLING BLANKS, MAKING ALTERATIONS, AND REFORMING. [§ 90.

"The filling of the blanks," said Mr. Justice Chapman in a case in which this rule of the common law was asserted by the Supreme Court of Massachusetts,¹ "created the substantial parts of the instrument itself; as much so as the signing and sealing. If such an act can be done under a parol agreement, in the absence of the grantor, its effect must be to overthrow the doctrine that an authority to make a deed must be given by deed. We do not think such a change of the ancient common law has been made in this commonwealth, or that the policy of our legislation favors it, or that sound policy would dictate such a change. Our statutes, which provide for the conveyance of real estate by deed acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is, to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, even where there is no fraud. . . . If this method of executing deeds is sanctioned, it will follow that, though the defendant has a regularly executed deed, yet it remains to be settled by parol evidence whether he ought to have been the grantee, what land should have been described, whether

that case. In the case before the court, the question whether the mortgagee's name could be filled in by one acting for the mortgagor, under parol authority, was left undecided; for in that case the name of the lender was not filled in at all; and it was held that the mortgage was ineffectual as security in the hands of one who had advanced money upon it in that condition. See, also, *Campbell v. Smith*, 8 Hun (N. Y.), 6; 71 N. Y. 26.

The authority of *Texira v. Evans* has also been followed in South Carolina: *Duncan v. Hodges*, 4 McCord (S. C.), 239.

It was followed in the earlier cases in Pennsylvania: *Wiley v. Moor*, 17 S. & R. 438; but in *Wallace v. Harmstad*, 15 Pa. St. 462, Chief Justice Gibson said that *Texira v. Evans* could only be sustained on the ground that the obligor had estopped himself by an act *in pais*; which is in effect to wholly discard the doctrine of the case.

There is a *dictum* by Mr. Justice Nelson, of the Supreme Court of the United States, followed by *Wagner, J.*, in *Missouri*, that a person competent to convey real estate may sign a deed in blank and authorize an agent to fill it up; but it was held in both cases that a married woman could not make such a conveyance of her separate estate, having no authority to delegate such powers. *Drury v. Foster*, 2 Wall. 24; *McQuie v. Peay*, 58 Mo. 56.

It is followed, also, in *Wisconsin*: *Van Etta v. Evanson*, 28 Wis. 33; *Vliet v. Camp*, 13 Wis. 198.

In *Van Etta v. Evanson*, *supra*, where it was held that the name of the mortgagee might be filled in by an agent, after the execution of the mortgage, the ground was taken that the fact of the delivery of the paper to the agent sufficiently showed the intention that he should supply the name of the person who might take the mortgage.

¹ *Burns v. Lynde*, 6 Allen (Mass.), 305.

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the deed should have been absolute or conditional, and if conditional, what the terms of the condition should have been. To leave titles to real estate subject to such disputes would subject them to great and needless insecurity."

91. Written authority is essential for filling any blank which materially affects the meaning and operation of a deed. If any such blank be filled after execution by another person having only verbal authority, unless the instrument be redelivered and acknowledged anew, it is void. Such authority to another to fill up an instrument or any material part of it after its execution is sufficient in case of a simple contract, but not for filling up a sealed instrument. The stream can never rise higher than its source. Authority to make an instrument under seal, or to affix a seal to it, must be given by an instrument of equal authority.¹ The name of the grantee or mortgagee cannot be properly filled in after execution of the instrument. Such name may, however, be filled in by the officer taking the acknowledgment of the deed, before the delivery of it to the grantee.²

Where the mortgagor after the execution of the deed by his wife, without her knowledge, inserts the description of additional property, the mortgage is a valid lien upon the property originally covered by it; and though it would ordinarily be valid as to the additional property against the husband, it is not so when the additional property is a homestead, for the conveyance of which it is necessary that husband and wife should join.³

92. The mortgagor may be estopped from taking advantage of the irregular execution through the filling of blanks by some one not authorized in writing, by his acts in relation to the transaction. But the mere fact that he has enjoyed the benefit of the money obtained upon it, or a portion of the money, is not by itself a sufficient ground upon which to found an equitable es-

¹ Upton v. Archer, 41 Cal. 85.

In a case recently before the Court of Appeals in Virginia (Preston v. Hull, 23 Gratt. 600), where the filling in of the name of an obligee in a bond, after the execution of it, was held to render it invalid, the doctrine of the text was fully declared. Upon the point under consideration Mr. Justice Staples said: "If the name of the obligee may be inserted, why may not the sum also; and if these may be supplied, why not the more formal parts of the deed? If we once depart from the

rule, how is the line to be drawn consistently with the preservation of any rule at all? If we say that the name or sum may be inserted by the agent, will it not lead us inevitably to the doctrine that the entire deed may be executed by the agent also? We shall be carried on step by step, if we mean to be consistent, until we have destroyed all the well settled distinctions between sealed and unsealed instruments."

² McNab v. Young, 81 Ill. 11.

³ Van Horn v. Bell, 11 Iowa, 465. See White v. Owen, 30 Gratt. (Va.) 43.

toppel. Thus where a deed was so filled up and delivered to the grantee, who was ignorant of any irregularity in the execution of it, and the grantors being fully advised of the delivery of the deed permitted the grantee to enter into possession and make improvements, and became his tenants and paid him rent, they were not allowed to claim that the deed was void by reason of such irregularity.¹ Objection that a deed was executed in blank, and the name of the grantee inserted after delivery, can only be taken by the grantor, or by some one claiming through him, or in his right.²

93. A mortgagee invoking the aid of estoppel must show that he has been vigilant and careful in the protection of his own rights and interests. No protection will be given him against his own negligence and folly.³ To avail himself of the acts or admissions of the mortgagor, he must have been ignorant of the irregularity in the execution of the mortgage, and must have taken it with good reason to suppose it was properly executed.

Moreover, the subsequent acts of the mortgagor are no admission or ratification of the giving of the mortgage, unless the facts of the transaction be known to him.⁴ He cannot ratify a thing that he does not know the existence of, and cannot be estopped by acts he never performed.

94. A material alteration of a mortgage made without the consent of the mortgagor by the holder of it, or by any one after delivery, and while in the possession or custody of the rightful owner of it, has the effect of destroying and annulling the instrument as between the parties to it.⁵ An alteration by a mere stranger without the knowledge or consent of the holder, and

¹ Knaggs v. Mastin, 9 Kans. 532.

² McNab v. Young, 81 Ill. 11.

³ Ayres v. Probasco, 14 Kans. 175, 190, 197. Mr. Justice Valentine said: "Where a person negligently or knowingly puts it within the power of some other person to swindle and defraud him, and he is thereby swindled and defrauded, he is generally allowed to suffer the consequences of his own negligence and folly." In the case before the court, the mortgagee, through his agent, knew that the mortgage was executed in blank and afterwards filled up in the absence of the wife, whose land it was intended to mortgage, inasmuch as the deed was filled up in the agent's presence. When the mortgage so executed

was offered to him he should have said: "I know that mortgage is void, as a mortgage of Mrs. Ayres; I will, therefore, not receive it. You must furnish me a better mortgage if you want the money."

⁴ In the same case, in illustration of this point, the same justice said: "There is no evidence showing that Mrs. Ayres ever beforehand authorized said mortgage to be filled up as it was in fact filled up, or ever afterward knew that the same was so filled up, or ever knew that it was delivered to Probasco as the mortgagee, or ever performed an act which could be construed into a ratification of the instrument."

⁵ Marcy v. Dunlap, 5 Lans. (N. Y.) 365.

while it is out of his custody, does not have this effect.¹ This principle was applied to making void a mortgage altered under the following circumstances: A married woman being the owner of a house and lot, known as lot H, executed a mortgage to secure her husband's debt, in consideration of the extension of the time of payment. The mortgage, however, did not describe her property, but described a lot known as lot 26. After the delivery of the deed the error was discovered, and the mortgagee's attorney took the mortgage to the husband and his attorney for correction. The words, "being the same property conveyed to the party of the first part," &c., describing the deed to the mortgagor of lot H, were added to the description contained in the mortgage, by the husband's attorney, in the presence of the attorney of the mortgagee, without consulting the wife in regard to the alteration, and she had no knowledge of the change until suit was brought to reform and foreclose the mortgage. It was held that the suit could not be maintained for either purpose.²

95. An alteration of an instrument which does not change its legal effect does not in law amount to an alteration, and of course does not invalidate it either at law or in equity.³ An alteration which does change the legal effect of the deed may at any time be made by consent of both parties to it; thus it has been held, that authority given in a mortgage to the recorder to insert a portion of the description omitted, when it could be obtained, is equivalent to a power of attorney to make such addition, and that a subsequent incumbrancer could not object to the exercise of this power.⁴ It would seem, nevertheless, that the description given in the mortgage to warrant such a filling up must be sufficient to indicate the property with such certainty that the lien upon it would exist without such further description.

¹ *Marcy v. Dunlap*, *supra*, per Johnson, J., and cases cited.

² *Marcy v. Dunlap*, *supra*.

³ *Goodenow v. Curtis*, 33 Mich. 505. As to burden of proof to show whether an interlineation was made before or after execution, see *Cox v. Palmer*, 1 McCrary, 431.

⁴ *Harshey v. Blackmarr*, 20 Iowa, 161. The description was as follows:—

"We, J. L. Blackmarr and Belinda (his wife), sell and convey unto John Har-

shay, &c., the following described premises, in Marshall County, Iowa, to wit: eighty acres of land, bought of Rev. James M. Holland, lying ten miles southward from Marshalltown, in Marshall County, Iowa; and so soon as the numbers of the above land are obtained, we agree that they shall be inserted in this deed, as our own voluntary act, and the recorder of Marshall County is instructed to do the same for us."

A mortgage is not rendered invalid by the grantee's fraudulently adding the name of the mortgagor's wife in release of dower.¹ It is valid as against the husband without the wife's signature. The title to the property passes and vests in the grantee by the execution of the deed, and the subsequent alteration or destruction of the instrument does not affect this title.

96. The terms of a mortgage cannot be varied by any verbal agreement, or understanding of the parties, anterior to the execution of it. It cannot rest partly in writing and partly in parol. No evidence of the acts or conversation of the parties prior to the execution of the mortgage, or at the time of it, can be admitted to contradict or vary the instrument.² The fact that a mortgagor before the signing of the mortgage objected to the terms of it, and desired to reserve a certain portion of the property included in it, cannot be received to vary the effect of it.³ Even an agreement of the parties, at the time of the execution of the mortgage, that it should not be a lien upon certain portions of the property included in it, would have no effect against the terms of it.

The terms of the mortgage may, however, be varied by a written agreement executed at the time of the mortgage. Such an agreement then becomes in fact a part of the mortgage, and the two instruments must be construed together.⁴

97. Reforming the mortgage. — Whenever there has been a material omission or mistake in the deed, so that it fails to express what the parties intended, a court of equity may, as between the parties, reform and correct it in accordance with the transaction as it was actually agreed upon.⁵ Thus, for instance, when part of the lands agreed to be mortgaged were omitted in the mortgage deed, it may be so reformed as to include them.⁶ And so, on the other hand, if by mistake it include land not belonging to the grantor,⁷ or other land of his not intended to be included, the description may be reformed. A material mistake in any part of the deed, as, for instance, in the condition,⁸ or in

¹ Kendall v. Kendall, 12 Allen (Mass.), 92.

² Quartermous v. Kennedy, 29 Ark. 544.

³ Patterson v. Taylor, 15 Fla. 336.

⁴ Pitzer v. Burns, 7 W. Va. 63.

⁵ Anderson v. Baughman, 7 Mich. 69; Loomis v. Hudson, 18 Iowa, 416; Men-

denhall v. Steckel, 47 Md. 453; McMillan v. N. Y. Water Proof Paper Co. 29 N. J. Eq. 610. See, also, § 1464.

⁶ Blodgett v. Hobart, 18 Vt. 414; Hunt v. Hunt, 38 Mich. 161.

⁷ Ruhling v. Hackett, 1 Nev. 360.

⁸ Wooden v. Haviland, 18 Conn. 101.

the estate conveyed, the word *successors* having been used instead of *heirs*, may be reformed.¹ But the court will not correct a mere error of statement as to the origin of the mortgagor's title, when the deed is effectual as it stands.²

A mortgage may be reformed by inserting the name of the mortgagee when this has been omitted by mistake, and it appears upon the face of the mortgage that the consideration moved from the complainant, that it was given to secure a debt due to him, and that the omission of the name was a mere oversight.³

When a mistake is clearly shown, a claim by the adverse party of misapprehension on his part will not be regarded.⁴ But the fact of mistake must be shown beyond a reasonable doubt;⁵ as also what the parties really intended.⁶ "The proof of mistake must be clear and certain before an instrument can be reformed; as the object of the reformation of an instrument is to make it express what the mind of the parties to it had met upon, and what they intended to express, and supposed they had expressed, in the writing. Unless this meeting of minds, and mistake in expressing it, is made quite clear and certain by evidence, the court, should it undertake to reform, might, under color of reformation, make a contract for the parties which both never assented to, or intended to make."⁷ The mistake, to be the subject of reformation, must be not merely the oversight of one of the parties, but such that the deed fails to express what was intended and agreed upon by both parties.⁸ The court will not reform a deed so as to add to it a new condition not contemplated by one of the parties in the execution of it;⁹ it will not make it include what was intended by one party unless it appear that the other party at the time had the same intention; or unless the other party fraudulently induced him to believe the mortgage contained what he asks to have it made to include; as where the mortgagor by false and fraudulent representations induced the mortgagee to believe, when he loaned the money and accepted the mortgage, that it covered more and other land and

¹ *McMillan v. N. Y. Water Proof Paper Co.* 29 N. J. Eq. 610; *Fish v. N. Y. Water Proof Paper Co.* 29 N. J. Eq. 16.

² *Hathaway v. Juneau*, 15 Wis. 262.

³ *Parlin v. Stone*, 1 McCrary, 443.

⁴ *Wooden v. Haviland*, 18 Conn. 101.

⁵ *Hervey v. Savery*, 48 Iowa, 313.

⁶ *Turner v. Hart* (D. C. Ky. 1880), 1 Fed. Rep. 295.

⁷ Per Johnson, J., in *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365, 370; and see *Alexander v. Caldwell*, 55 Ala. 517.

⁸ *Barker v. Harlan*, 3 Lea (Tenn.), 505.

⁹ *Hart v. Hart*, 23 Iowa, 599, where the court refused to reform a mortgage for support, so as to require the mortgagee to live at a particular place.

buildings than it did, the mortgage was reformed, and enforced against the lands fraudulently omitted.¹

The right to have a deed reformed may be lost by laches.²

98. Who may obtain reformation. — A mortgagee who has sold the note and mortgage, and afterwards bought them back again, has the same right to have a mistake corrected as he had before he made the transfer, if he indorsed the note at the time of the sale.³ He may have the mistake corrected upon its discovery for the first time after he has purchased the land under a foreclosure sale, and taken possession as purchaser.⁴ But the court will not reform a description in a mortgage deed at the suit of another who has become purchaser at a sale by the mortgagee.⁵

The party desiring a reform of a deed should bring a bill in equity for the purpose. A mortgagor cannot ask for this relief in answer to a bill to foreclose; but he may file a cross-bill.⁶ The mortgagee may ask for a reformation of the mortgage in a bill to foreclose it.⁷

99. Against whom it may be had. — A mistake in the description of the land may be corrected as between the parties, but courts of equity can grant no relief as against one who has purchased the property in good faith and for a valuable consideration; and consequently a bill which seeks to do this is defective, when it fails to allege that the purchaser took the land with notice of the mistake.⁸ It is obvious, however, that a purchaser with notice stands in no better position than the mortgagor himself.⁹ As against a purchaser at an execution sale, notice of the mistake before or at the sale is sufficient.¹⁰

A mistake in the mortgage of a married woman in a matter of

¹ *De Peyster v. Hasbrouck*, 11 N. Y. 582; and see *Rider v. Powell*, 28 N. Y. 310.

² *Paulison v. Van Iderstine*, 29 N. J. Eq. 594. See *First Nat. Bank v. Gough*, 61 Ind. 147.

³ *Kennard v. George*, 44 N. H. 440.

⁴ *Davenport v. Sovil*, 6 Ohio St. 459; See *First Nat. Bank v. Gough*, 61 Ind. 147.

⁵ *Haley v. Bagley*, 37 Mo. 363.

⁶ *French v. Griffin*, 18 N. J. Eq. 279.

⁷ *Alexander v. Rea*, 50 Ala. 450; *Milner v. Kolb*, 47 Ind. 220; § 1464.

⁸ *Sickmon v. Wood*, 69 Ill. 329. *Reeves v. Vinacke*, 1 McCrary, 213; *Easter v. Severin*, 64 Ind. 375; *Munford v. Miller*, 7 Brad. (Ill.) 62; *McLouth v. Hurt*, 51 Tex. 115; *Fitch v. Boyer*, 51 Tex. 336.

⁹ *Gale v. Morris*, 29 N. J. Eq. 222; *Rutgers v. Kingsland*, 7 N. J. Eq. (3 Hals.) 178, 658; *Fielder v. Varner*, 45 Ala. 429; *Ruhling v. Hackett*, 1 Nev. 360; *Strang v. Beach*, 11 Ohio St. 283; *Hunt v. Hunt*, 38 Mich. 161. See, however, *Goodman v. Randall*, 44 Conn. 321.

¹⁰ *Williams v. Hatch*, 38 Ala. 338.

§§ 100, 101.] FORM AND REQUISITES OF A MORTGAGE.

description merely may be reformed.¹ A mortgage may be reformed as against a junior mortgagee, whose mortgage was taken, without notice of such a mistake, as security for an antecedent debt, without the surrender of any old security, and without any new consideration moving from him,² in a state where such a purchaser is not considered a purchaser for value.³ The mistake may be corrected, too, against a subsequent judgment creditor;⁴ but not against a purchaser of a subsequent judgment, who has invested his money in the purchase of the judgment upon the faith of the apparent lien upon the land.⁵ The equity of the mortgagee is regarded as stronger than that of the judgment creditor, who has not, probably, parted with his money on the faith of the apparent facts. But when the judgment has been sold and assigned to one ignorant of the mistake in the mortgage, and who has expended his money upon the faith of the rights of the parties as they appear in the respective securities, it is not considered that there is any superior equity in the mortgagee.⁶

A mortgage as between the parties to it may be reformed by affixing a seal to it; but such reformation would give no validity to a sale made by virtue of a power contained in it. The sale would be a nullity for want of any authority in the mortgagee to make it, and the reformation could give no validity to a transaction originally void.⁷

100. On proof of the loss of a mortgage deed without record of it having been made, the court may, under ordinary circumstances, decree the making of a new mortgage.⁸ This may be the only adequate remedy, and without it the mortgagee may be exposed to the total loss of his security. The loss of deeds is a familiar ground of equitable relief.

101. A principle of construction applicable to mortgages is, that inasmuch as the mortgagor is supposed to make his own

¹ *Carper v. Munger*, 62 Ind. 481; *Hamar v. Medsker*, 60 Ind. 413. But see *Potisch v. Hambach*, 48 Wis. 443.

² *Busenbarke v. Ramey*, 53 Ind. 499.

³ See § 458.

⁴ *Sample v. Rowe*, 24 Ind. 208; *White v. Wilson*, 6 Blackf. (Ind.) 448; *Brewster v. Clamfit*, 33 Ark. 72; *Wainwright v. Flanders*, 64 Ind. 306.

⁵ *Flanders v. O'Brien*, 46 Ind. 284; *Wainwright v. Flanders*, *supra*.

⁶ *Flanders v. O'Brien*, *supra*.

The rule is otherwise, however, in Ohio; *Van Thorniley v. Peters*, 26 Ohio St. 471; *White v. Denman*, 1 Ohio St. 110; S. C. 16 Ohio, 59; *Hood v. Brown*, 2 Ohio, 266.

⁷ *Springfield Sav. Bank v. Springfield Cong. Soc.* 127 Mass. 516.

⁸ *Lawrence v. Lawrence*, 42 N. H. 109, and cases cited.

selection of words and terms in drawing the deed, whenever its language is equivocal or ambiguous, it is construed most strongly against him, and in such manner as to make it a valid and binding security for the mortgagee.¹

Another principle of construction is, that the intention of the parties as gathered from the instrument is to govern, if the intention be such that it may be legally enforced. "There is no doubt that the intention is the object to be sought for in construction. And to get at that, the situation of the parties, and the nature and object of their transactions, may be looked at. But it must be borne in mind that it is not the business of construction to look outside of the instrument to get at the intention of the parties, and then carry out that intention whether the instrument contains language sufficient to express it or not; but the sole duty of construction is to find out what was meant by the language of the instrument."² Where property is exchanged by deeds and one grantee gives a mortgage upon that which he receives, to secure the difference in value, the deeds and mortgage may be read together and with reference to the circumstances, in construing the intention of the parties; and their manifest intent is not to be derogated from by adhering to the literal terms of the papers. Equity regards substance rather than form and enforces the actual intent if lawful and just.³

¹ Jerome v. Hopkins, 2 Mich. 96, 100; Co. v. Commercial Bank of Racine, 15 Stuart v. Worden, 42 Mich. 154. Wis. 424, 438.

² Paine, J., in Farmers' Loan & Trust ³ Stuart v. Worden, *supra*.

CHAPTER III.

THE PARTIES TO A MORTGAGE.

PART I.

WHO MAY GIVE A MORTGAGE.

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| I. Disability of insanity, 103. | IV. Tenants in common of partnership |
| II. Disability of infancy, 104, 105. | real estate, 119-123. |
| III. Married women, 106-118. | V. Corporations, 124-128. |
| | VI. A power to mortgage, 129, 130. |

102. **Legal capacity to mortgage.** — In general, any person who has a legal capacity to act for himself may make a mortgage of his property, or may authorize any one else to do this in his behalf. By statutory provisions in many states, guardians or others acting for infants, insane or other persons, without legal capacity to act for themselves, may be authorized, upon application to court showing sufficient cause, to convey in mortgage the real estate of their wards. Like authority is sometimes given to trustees, executors, or administrators, although not having title to the property themselves, but only authority over it for certain purposes, and acting in a representative capacity in respect to it, to mortgage it for the benefit of the parties in interest. A mortgage made by an executor or administrator without the authority of a statute is void, and the heirs in whom is vested the estate are not estopped to plead the invalidity of the mortgage by reason of the benefit resulting to them from the money obtained upon it.¹ Such mortgages depend upon the particular provisions authorizing them, which are too various to be given here. It may be remarked, however, that this statutory power must be exercised strictly for the purposes for which it is given, and all the requirements of the statutes in regard to obtaining and exercising the authority must be strictly followed.² But when the power to mortgage has been granted by a court of competent

¹ *Black v. Dressell*, 20 Kans. 153.

Wetherill v. Harris, 67 Ind. 452; *Mer-*

² *Edwards v. Taliaferro*, 34 Mich. 13; *ritt v. Simpson*, 41 Ill. 391.

jurisdiction the parties to the mortgage are protected by the license without investigating the truth of the facts upon which it was granted ; their truth cannot be questioned in any collateral proceeding.¹

A corporation, if capable of holding real estate, has, like a person, the power of conveying it in mortgage, unless it is under some disability imposed by statute or implied from its duties to the public. But while a person capable of making a grant may, if he choose, employ another to act for him, a corporation must always act by an agent.

Disabilities are either natural, as in the case of insane persons, or legal, as in the case of married women and corporations, while the disability of infancy is either the one or the other, according to the circumstances of the case.

1. *Disability of Insanity.*

103. A mortgage made by one who was insane at intervals both before and after the execution of it, as to its validity, depends upon the question whether he was sane at the time ; and the fact of his sanity must in such case be established by clear and satisfactory evidence.² If the mortgagor at the time he executed the mortgage comprehended what he was doing, and the consequences of his acts, it will be held valid, if it be fair and no undue advantage has been taken of him, although it may appear probable that there were times, previous to the execution of the mortgage, when he might not have had sufficient capacity, on account of a disease which would not be uniform in its influence on his mind.³ But an injunction to prevent a sale by a mortgagee was made perpetual, where it appeared that the mortgagor was in a condition verging upon insanity through habitual drunkenness, and the mortgagee, who had complete power over him, could not show that he had given any consideration for the mortgage.⁴

A mortgage made by one who had had periodical recurrences of insanity, and was insane at the time he gave the mortgage, was set aside, though he had all along managed his own affairs with average correctness, and had been treated by his neighbors as competent to do business even while they considered him of un-

¹ *Griffin v. Johnson*, 37 Mich. 87.

² *Ripley v. Babcock*, 13 Wis. 425.

³ *Day v. Seely*, 17 Vt. 542.

⁴ *Van Horn v. Keenan*, 28 Ill. 445.

sound mind, and though he was not so manifestly insane as to make the conduct of the mortgagee fraudulent in making the bargain which it was meant to secure, notwithstanding the latter had been given sufficient warning to put him on his guard.¹

A mortgage will not be set aside on account of the weakness of the mortgagor's intellect, unless advantage has been taken of such weakness in procuring the mortgage. This rule applies to the execution of a deed.²

2. Disability of Infancy.

104. An infant who has purchased land, and given back a mortgage for the purchase money or a part of it, may, upon coming of age, avoid the transaction; he may relinquish the property and reclaim the money paid on account of it.³ But if he seeks to avoid the debt and mortgage, he must surrender and reconvey the property. If he continue to hold the estate and to apply it to his own uses, he affirms the mortgage and makes himself legally liable for its payment.⁴ The contract being voidable only, if he wishes to disaffirm it, he must do so promptly upon coming of age.⁵ If he ratifies the conveyance to himself, he ratifies his mortgage for the purchase money. They constitute one transaction, and he cannot enjoy the one without being bound by the other.⁶ He is not allowed after coming of age to try his chances of gaining something by the transaction, and then, upon finding that he cannot, to plead his disability. If an action to foreclose the mortgage be brought after his coming of age, and he allows a decree of sale to be entered, he cannot then, upon finding there is a deficiency instead of a surplus, escape liability for it by setting up his disability.⁷

105. Ratification of infant's mortgage. — A mortgage given

¹ *Curtis v. Brownell*, 42 Mich. 165.

² *Marmon v. Marmon*, 47 Iowa, 121; S. C. 7 Reporter, 302.

³ *Willis v. Twambly*, 13 Mass. 204. By statute in Ohio a woman of the age of eighteen years may execute a valid conveyance. R. S. 1880, §§ 4106, 4107.

⁴ *Roberts v. Wiggin*, 1 N. H. 73; *Robbins v. Eaton*, 10 N. H. 561; *Badger v. Phinney*, 15 Mass. 359; *Callis v. Day*, 38 Wis. 643; *Bigelow v. Kinney*, 3 Vt. 353; *Hubbard v. Cummings*, 1 Me. 11; *Young v. McKee*, 13 Mich. 552; *Henry v. Root*,

33 N. Y. 526, 553; *Lynde v. Budd*, 2 Paige (N. Y.), 191; *Kitchen v. Lee*, 11 Ib. 107; *Coutant v. Servoss*, 3 Barb. (N. Y.) 128; *Grace v. Whitehead*, 7 Grant (U. C.) Ch. 591.

⁵ *Loomer v. Wheelwright*, 3 Sandf. (N. Y.) Ch. 135; *Featherston v. McDonell*, 15 U. C. C. P. 162.

⁶ *Dana v. Coombs*, 6 Me. 89; *Heath v. West*, 8 Fost. (N. H.) 101.

⁷ *Flynn v. Powers*, 35 How. (N. Y.) Pr. 279; S. C. aff. 36 Ib. 289; *Terry v. McClintock*, 41 Mich. 492.

by an infant, being as a general rule voidable only and not void, he may on coming of age ratify it. This he may do in various ways. The mere retaining possession of land, for which he has given a mortgage for the purchase money, is a ratification of the whole transaction, and makes him liable upon the mortgage.¹ So any other mortgage for his benefit he may on coming of age make good and effectual by recognizing or confirming it. His conveyance of the same land, after attaining his majority, subject to the mortgage, is a sufficient confirmation of it.² A subsequent execution of a deed to a third person, which does not refer to the mortgage, does not necessarily amount to a repudiation of the mortgage.³ And so a will made by one after coming of age, whereby he directed the payment of "all his just debts," is upon his death a sufficient confirmation of a mortgage and bond executed during his infancy to secure the payment of borrowed money.⁴

The subsequent ratification in all cases relates back to the original execution of the mortgage as against all persons except purchasers for a new and valuable consideration.⁵

It has been held, however, that a mortgage by an infant which was not in any way for his benefit, as, for instance, one made as surety for another, is not merely voidable, but void, and therefore not subject to ratification. Thus a mortgage given by an infant *feme covert*, to secure the debt of her husband, is held to be absolutely void, and incapable of confirmation.⁶

Coverture of a female infant does not remove the disability of minority. If she has given a mortgage of her land during her minority, her husband joining in it, she may repudiate it on coming of age, and she is not bound to return the consideration received unless she still has the proceeds of it in her hands specifically.⁷

¹ *Callis v. Day*, 38 Wis. 643, and cases cited; and see *Schouler's Dom. Rel.* 518 *et seq.*

² *Story v. Johnson*, 2 Y. & C. Exch. 607; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Lynde v. Budd*, 2 Paige (N. Y.), 191; *Phillips v. Green*, 5 Mon. (Ky.) 355; *Allen v. Poole*, 54 Miss. 323. Or by part payment. *Keegan v. Cox*, 116 Mass. 289.

³ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁴ *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. (N. Y.) Ch. 544.

⁵ *Palmer v. Miller*, 25 Barb. (N. Y.) 399.

⁶ *Cronise v. Clark*, 4 Md. Ch. 403; *Chandler v. McKinney*, 6 Mich. 217.

⁷ See *Walsh v. Young*, 110 Mass. 396, and cases cited; *Dill v. Bowen*, 54 Ind. 204.

An infant *feme covert* cannot relinquish her dower by joining with her husband in a mortgage, but the same is void as to her.¹

3. Married Women.

106. At common law a married woman could not make a mortgage even to secure the payment of the purchase money of real estate conveyed to her. Both the mortgage and the note were void.² She had no power to make contracts. In equity, however, she has long occupied quite a different position in regard to her own property, and her power to contract in relation to it. In England the courts of equity have extended her rights over her separate estate and her liability for her contracts, until it is now the settled doctrine that her property is holden in equity for her engagements, whether in writing or not. Yet at law they cannot be enforced. Her obligations are not strictly debts. She is not personally holden for them; but her separate estate is subjected to their payment. The proceeding to enforce them, therefore, is in the nature of a proceeding *in rem*.

In this country the common law rights and liabilities of married women have been greatly changed by statute. Liberal provision is generally made in all the states for the holding of separate property by married women, and for their contracting in relation to it; but they have not generally gone to the extent of declaring that her entire separate estate shall be liable for her pecuniary engagements. Under these statutes, as a rule, she is merely authorized to contract with reference to her separate property; and she is not allowed to do this, even, except with the concurrence of her husband, or with the approval of some court.³

¹ Glenn v. Clark, 53 Md. 580.

² Savage v. Holyoke, 59 Me. 345; Newbegin v. Langley, 39 Me. 200; Heburn v. Warner, 112 Mass. 271; Owens v. Johnson, 8 Bax. (Tenn.) 265.

In Maryland, art. 16, sec. 31, of the Code of 1860 confers the power to confirm and make valid a conveyance by an infant *feme covert*, which might be shown, during her infancy, to be equitable, expedient, or proper, looking to her benefit; but it does not apply to any case after such infant has attained full age. Glenn v. Clark, 53 Md. 580.

³ As, for instance, in Massachusetts. See Gen. Stat. c. 108, § 3; Weed Sewing

Machine Co. v. Emerson, 115 Mass. 554; Concord Bank v. Bellis, 10 Cush. (Mass.) 276. But now, under St. 1874, c. 184, a married woman may contract "as if she were sole," and therefore the consideration of her contracts need not enure to her own benefit. Major v. Holmes, 124 Mass. 108.

To pass any interest in her property she must be a party to the granting part of the deed. A mortgage which purports on its face to be that of her husband merely does not bind her estate, though she signs and acknowledges it. Berrigan v. Fleming, 2 Lea (Tenn.), 271.

Her deed made without such consent or authority is invalid and cannot be enforced even in equity.¹ Even when given to secure the purchase money of the land, it does not amount to a declaration of trust in favor of the vendor.² Therefore, a deed by her in the name she bore before marriage, and not disclosing this, although made with the fraudulent purpose of imposing upon the grantee, does not estop her from setting up title in the land as against the grantee.³ Her sole deed is absolutely void.⁴

107. The equity doctrine in England, adopted also in some of our states, is that the separate property of a married woman is answerable for her debts and engagements to the full extent to which it is subject to her disposal. At a very early period in England it was held that a married woman, although incompetent at law to make a valid contract, would be regarded in equity as a *feme sole* in respect to her separate estate.⁵ "And the rule seems to have been universally recognized, where a married woman made an express contract respecting such an estate, of which she was entitled to the beneficial use, that she and the party with whom she contracted might have the aid of a court of equity to make the contract effectual."⁶ Lord Thurlow⁷ carried the doctrine farther, and declared he had "no doubt about this principle, that if a court of equity says a *feme covert* may have a separate estate, the court will bind her to the whole extent, as to making that estate liable to her own engagements; as, for instance, for the payment of debts." This subject and the English authorities upon it were fully examined by Lord Brougham, who arrives at the same result.⁸

¹ Elder v. Jones, 85 Ill. 384; Herdman v. Pace, 85 Ill. 345.

² Morrison v. Brown, 83 Ill. 562; Lewis v. Graves, 84 Ill. 205.

³ Lowell v. Daniels, 2 Gray (Mass.), 161.

⁴ Warner v. Crouch, 14 Allen (Mass.), 163.

⁵ Grigby v. Cox, 1 Ves. Sen. 517; Peacock v. Monk, 2 Ib. 190.

⁶ Per Hoar, J., in Willard v. Eastham, 15 Gray (Mass.), 328.

⁷ Hulme v. Tenant, 1 Bro. C. C. 16; and see same case in White & Tudor's Lead. Cas. in Eq. (Am. ed.) 324, and the authorities there collected.

⁸ In Murray v. Barlee, 3 Myl. & K. 209. "In all these cases," he says, "I

take the foundation of the doctrine to be this: The wife has a separate estate, subject to her own control and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were *discovert*. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly incumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the

108. Equity enforces her contract on her general property, because her contract not being a personal liability there is no remedy at law. Lord Cottenham,¹ agreeing in the doctrine established, was of opinion that in the reason of it there is nothing which has any resemblance to the execution of a power. "What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the particular estate, for a promissory note is merely a contract to pay, not saying out of what it is to be paid, or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a lien on that property. Equity lays hold of the separate property, but not by virtue of anything expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant*, is more logical. According to that view, the separate

court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imparted to this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always of course considered as made in execution of it. But so, if by any reference to the estate it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert*, without any reference to her separate estate, it was held, in the cases I have above cited, that she must have intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that pow-

er, though no direct reference is made to the power. Such is the principle. But doubts have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds and to require writing where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle."

¹ *Owens v. Dickenson*, Cr. & Phil. 48.

property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied."

109. The American courts do not carry the doctrine to this extent, but as a general rule hold that her separate estate is not chargeable with her debts or obligations not relating to her separate estate, unless she specially makes them a charge upon it by some instrument in writing. Her contracts, which do not concern her separate estate and are not made upon its credit, remain void as they were at common law. The statutes of the several states differ considerably in their effect upon her power to make contracts, and to charge herself and her real estate with them; but, as a general rule, equity, while holding it not to be answerable for any implied undertaking of hers, will enforce upon it her mortgage or other express contract, although it be not made for her benefit but for the sole benefit of another.¹ In a case in the Supreme Court of Massachusetts,² Mr. Justice Hoar, after a careful review of the authorities, said: "Our conclusion is, that when by the contract the debt is made expressly a charge upon the

¹ *Massachusetts*: *Heburn v. Warner*, 112 Mass. 271; *Willard v. Eastham*, 15 Gray, 328; *Rogers v. Ward*, 8 Allen, 387. *Illinois*: *Young v. Graff*, 28 Ill. 20. *New York*: *Yale v. Dederer*, 18 N. Y. 265; *S. C.* 22 N. Y. 450; *Owen v. Cawley*, 36 N. Y. 600; *Knowles v. McCamly*, 10 Paige, 342; *Gardner v. Gardner*, 7 Ib. 112; *Jaques v. Methodist Epis. Ch.* 17 Johns. 548; *Curtis v. Engel*, 2 Sandf. 287; *Cruger v. Cruger*, 5 Barb. 225, 227; *Ballin v. Dillaye*, 37 N. Y. 35; *White v. McNett*, 38 N. Y. 371; *White v. Story*, 43 Barb. 124; *Ledlie v. Vrooman*, 41 Ib. 109.

The earlier cases in New York approximate to the English rule, but the case of *Yale v. Dederer* took the ground stated in the text, and has been followed since. See § 111, notes 3 and 4.

Special attention is called to the case of *Yale v. Dederer* for a full and careful examination of the subject; also to *Corn*

Exchange Ins. Co. v. Babcock, 42 N. Y. 613, where the English and American cases are reviewed.

² *Willard v. Eastham*, 15 Gray (Mass.), 328, 335. In this case a note had been given by a married woman to her brother to establish him in business; but no mortgage or other charge upon her separate estate was given. Upon a bill in equity to charge it upon her estate, it was held that she was not liable, and the bill was dismissed. But in the later case of *Heburn v. Warner*, 112 Mass. 271, where a married woman, to enable her son to borrow money, gave her note, secured by mortgage of her separate estate, it was held that, while she was not liable upon the note, and the mortgage was void at law, yet in equity the mortgage should be enforced. And see *Nourse v. Henshaw*, 123 Mass. 96.

separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."

110. A married woman can bind herself personally only by such obligations as have reference to her separate property. She is not bound, therefore, by a note given by her alone or jointly with her husband for a debt of the husband.¹ The fact that the note is secured by a mortgage on her real estate does not make the note such an obligation respecting her separate estate as to render her liable upon it,² although the mortgage itself be in equity a valid and binding lien upon her separate property.³

Where a married woman is empowered by statute to bargain, sell, and convey her real estate or personal property, and enter into contracts in reference to it, she may deal with the property itself, by sale or otherwise, and assume obligations in connection therewith, as, for instance, for buildings upon her land; and she may bind herself to pay money for property purchased, as the property will become hers by the purchase, and the obligation to pay is in reference to her separate property.⁴ But this is the limit of her power. She cannot contract as surety for her husband or for any one else. The character of a note or other contract made by her is not affected as a contract applying to her separate property by reason that it is secured by a mortgage on her land. The mortgage is collateral to the note; the one is the principal, the other the incident; when the note is void the mortgage is void also, and cannot be foreclosed at law.⁵ "In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure the payment of a note, the defendant may

¹ *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; *White v. McNett*, 33 N. Y. 371; 96; *Brookings v. White*, 49 Me. 479; *Rowell v. Jewett*, 69 Me. 293.

Ledlie v. Vrooman, 41 Barb. (N. Y.) 109; *Burns v. Lynde*, 6 Allen (Mass.), 305, 313; *Athol Machine Co. v. Fuller*, 107

Mass. 437; *Willard v. Eastham*, 15 Gray (Mass.), 328; *Heburn v. Warner*, 112 Mass. 271; *Nourse v. Henshaw*, 123 Mass.

² *Williams v. Hayward*, 117 Mass. 532.

³ *Thacher v. Churchill*, 118 Mass. 108.

⁴ *Heburn v. Warner*, 112 Mass. 271, and cases cited.

⁵ *Brigham v. Potter*, 14 Gray (Mass.), 522; *Denny v. Dana*, 2 Cush. (Mass.) 160.

show the same matters of defence which he might show in defence of an action on the note ; ”¹ excepting only that he cannot plead the statute of limitations.²

But a married woman may, with the proper assent of her husband, convey her separate real estate, and if there be a valid consideration for the conveyance, it is as effectual as it would be if she were not married. She may therefore convey her real estate in mortgage to secure a valid debt, as, for instance, a valid note of her husband. Her mortgage is then binding, because it is a contract entered into by her in relation to her separate property, and to secure a valid and existing debt.³

It does not matter that she has also signed her husband's note as surety. To a suggestion in such a case that the mortgage was void, because it was made to secure a note signed by a married woman as surety, Chief Justice Bigelow said :⁴ “ This might be a very sound argument if the note was signed by the married woman alone. In such case, the note being void, the demandant would not be entitled to judgment for possession. But the note is not void. It is a valid contract binding on the other promisors. It is therefore the ordinary case of the conveyance of real estate by a valid deed to secure the payment of debt due to the grantee.” But when her mortgage is made to secure her own note given for the accommodation of her husband or any one else, the note being void, the security incident to it is void also. She can take the defence of invalidity in the same way that any mortgagor may defend on the ground of want of consideration, or of duress. Her defence at law to the note extends to the mortgage.

111. The foregoing examination of the question, how far a married woman can bind herself individually by her contracts, is applicable to the question of her liability for a deficiency⁵ arising upon the foreclosure of a mortgage upon her estate. It has been noticed that while in equity the lien upon her estate may be valid, her note or other personal obligation secured may be wholly void.⁶ Of course in such case, when the remedy has been exhausted against the mortgaged estate, there is no further

¹ Mr. Justice Metcalf, in *Vinton v. King*, 4 Allen (Mass.), 562.

² *Thayer v. Mann*, 19 Pick. (Mass.) 535.

³ *Newhart v. Peters*, 80 N. C. 166.

⁴ *Bartlett v. Bartlett*, 4 Allen (Mass.), 440.

⁵ See § 1718.

⁶ *Heburn v. Warner*, 112 Mass. 271.

remedy against her.¹ If, for instance, she borrow money upon a mortgage of her real estate for the accommodation of her husband, and it is paid to him, she is under no liability for any deficiency after the application of the property to the repayment of the loan.²

A married woman may bind herself personally for a loan made to her upon her mortgage of her real estate, if the loan be for the benefit of her separate estate.³ That the loan is for the benefit of her separate estate may appear by the mortgage, or may be shown by evidence.⁴

112. The English doctrine is, however, adopted in some states, and a wife's separate property is in equity held liable generally for her debts.⁵ As to her separate property she is regarded as a *feme sole*, and is allowed to make any contract in relation to it she may choose; and if she executes a note secured by a mortgage upon her separate property, her promise to pay is construed as relating, not only to the mortgaged premises, but to her separate property generally.⁶ It is regarded as right that her

¹ *Kidd v. Conway*, 65 Barb. (N. Y.) 158; *Nourse v. Henshaw*, 123 Mass. 96.

Prior to the statute of 1860, c. 90, it was held in New York that a married woman could not bind herself personally for the price of real estate bought by her and conveyed to her; *Knapp v. Smith*, 27 N. Y. 277, 279; nor for the rent reserved upon a lease to her, though the lease itself was otherwise valid, and the lessor might re-enter. So a mortgage for the price of real estate conveyed to her was valid in equity, though the note or bond given in connection with it was not. Since the above statute she can bind herself for any matter pertaining to her separate estate.

² *White v. McNett*, 33 N. Y. 371; *Payne v. Burnham*, 62 N. Y. 69, reversing 2 Hun, 143; *Manhattan Brass & Manuf. Co. v. Thompson*, 58 N. Y. 80.

In New York, by Laws 1862, c. 172, § 7, it is provided that a married woman may be sued in any court, and a judgment recorded against her may be enforced against her sole and separate estate in the same manner as if she were sole. The effect of this statute is to give a legal remedy against her property generally for her debts and not merely a remedy in equity against her estate expressly charged with

the payment of a debt for which she was not personally liable. *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; *First Nat. Bank of Canandaigua v. Garlinghouse*, 53 Barb. (N. Y.) 615; *Andrews v. Monilaws*, 8 Hun (N. Y.), 65.

³ *Payne v. Burnham*, *supra*. Otherwise in Pennsylvania. *Sawtelle's Appeal*, 84 Pa. St. 306.

⁴ *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613.

⁵ 1 Bishop on Mar. Women, § 873; *Schouler's Dom. Relations*, 230; *Todd v. Lee*, 15 Wis. 365; *Johnson v. Cummins*, 16 N. J. Eq. 97; *Wheaton v. Phillips*, 12 N. J. Eq. 221; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Glass v. Warwick*, 40 Pa. St. 140; *Cummings v. Sharpe*, 21 Ind. 331; *Webb v. Hoselton*, 4 Neb. 308; *Deering v. Boyle*, 8 Kans. 525, where the cases are fully examined; *Todd v. Lee*, 15 W. s. 365; *Heath v. Van Cott*, 9 Wis. 516; *Smith v. Wilson*, 2 Met. (Ky.) 235; *Johnston v. Feuson*, Ib. 503; *Sharp v. Proctor*, 5 Bush (Ky.), 396; *Hobson v. Hobson*, 8 Ib. 665; *Alexander v. Bouton*, 55 Cal. 15.

⁶ *Alexander v. Bouton*, 55 Cal. 15; *Marlow v. Barlew*, 53 Cal. 456. A married woman, except in relation to her separate

property should pay her pecuniary engagements, whether they are made for her own benefit or not, and whether they are charged upon particular property or not. Neither does it matter whether her engagements be express or implied; whether they be in writing or by parol merely. Having the power to contract debts, and to bind her separate property for their payment, she is regarded as intending that her obligations shall be enforced according to their purport.

In other states the capacity of married women to make contracts has been enlarged by statute, so that in effect she is enabled to bind herself and her property as if she were sole.¹

113. A married woman may make a valid mortgage of her separate property to secure the payment of the debt of her husband or of any other person, in the same manner as if she were unmarried.² Any consideration which would be sufficient to support the obligation if made by any one else, as, for instance, the granting of the original loan, or a subsequent extension of the time of payment of the debt, is sufficient to support her undertaking.³ Her mortgage, given to secure the payment of the bond of her husband, will not be regarded as having no validity or binding effect simply because the consideration of the

property, is, in California, under a disability to contract.

¹ As in *Massachusetts*: Acts 1874, c. 184; *Nourse v. Henshaw*, 123 Mass. 96. *Indiana*: provided her husband join with her. 1 R. S. 1876, p. 550; *Layman v. Shultz*, 60 Ind. 541, 547; *Brick v. Scott*, 47 Ind. 299. *Michigan*: *Fricke v. Donner*, 35 Mich. 151. *Minnesota*: Laws 1869, c. 56, § 2; *Northwestern Mut. Life Ins. Co. v. Allis*, 23 Minn. 337. *Georgia*: Act of 1866; *Hawkins v. Taylor*, 61 Ga. 171; *Tift v. Mayo*, 61 Ga. 246. In *Louisiana* a married woman cannot mortgage her separate estate without judicial authority. *Stuffer v. Puckett*, 30 La. Ann. 811. *California*: Civil Code, §§ 158, 162. In this state property acquired after marriage by either husband or wife, or by both, otherwise than by gift, bequest, devise, or descent, is called community property, of which the husband has the management and control with absolute power of disposition, except by will. Civil Code, §§ 164, 172. If real estate be purchased with such property, and the title be taken

in the name of the wife, a mortgage of it by her creates no lien. Yet her mortgage is not void in the extreme sense; and if the husband afterwards dies, and the wife inherits the property, the mortgage becomes a lien on the interest thus inherited by her, subject to the payment of the debts of the estate. *Parry v. Kelley*, 52 Cal. 334.

² §§ 109, 110; *Campbell v. Tompkins*, 32 N. J. Eq. 170; *Conover v. Grover*, 31 N. J. Eq. 539; *Collins v. Wassell*, 34 Ark. 17, 33; *Marlow v. Barlew*, 53 Cal. 456; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129, 144; *Firemen's Ins. Co. v. Bay*, 4 Barb. (N. Y.) 407; *Tooker v. Sloan*, 30 N. J. Eq. 394; *Robbins v. Abrahams*, 1 Halst. (N. J.) Ch. 465; *Iowa Code*, § 2506; *Low v. Anderson*, 41 Iowa, 476; *Smith v. Osborn*, 33 Mich. 410; *Short v. Battle*, 52 Ala. 456; *Comegys v. Clarke*, 44 Md. 108; *Plummer v. Jarman*, 44 Md. 632; *Moore v. Fuller*, 6 Oregon, 272.

³ *Low v. Anderson*, *supra*; *Short v. Battle*, *supra*.

bond is an obligation merely moral and not enforceable at law or in equity.¹ Whatever conflict there may be in the authorities as to the ability of a wife to charge herself personally for any debts not contracted for her own benefit, there is a general unanimity in holding that a mortgage upon her property may be enforced against that, whether made for her benefit or not.

The mortgage of a married woman upon her property, given to secure a debt of her husband, but taken by the mortgagee in good faith and without fraud on his part, will seldom, if ever, be set aside, even on proof that her husband procured her execution of it by fraudulent representations.² A wife having executed a paper at the request of her husband, without reading it or inquiring as to the contents of it, although it was a mortgage of her property, the mortgagee having no knowledge of this fact, was not allowed to restrain the execution of it, on the ground that it was procured by fraud or deceit.³ But the court will refuse to enforce a mortgage, the execution of which by the wife was procured by harshness and threats on the part of the husband so excessive as to subjugate and control the freedom of her will;⁴ or one procured by the husband as agent for his creditor upon a false representation that the consideration of it was merchandise to be shipped to her for her use in her separate business.⁵

It is provided by statute in Indiana that a married woman shall not mortgage or in any manner incumber her separate property acquired by descent, devise, or gift as a security for the debt or liability of her husband or any other person.⁶

114. A wife who has mortgaged her separate property for her husband's debt is in the position of a surety.⁷ She is entitled to all the rights of a surety, and her liability and the mortgage lien are discharged by the extension of the time of payment without her consent,⁸ if the extension be a binding obliga-

¹ *Campbell v. Tompkins*, 32 N. J. Eq. 170. Y.) Ch. 129; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Young v. Graff*, 28 Ill.

² *Spurgin v. Traub*, 65 Ill. 170. Text quoted with approval in *Collins v. Wasell*, 34 Ark. 17, 33. 20; *Bartlett v. Bartlett*, 4 Allen (Mass.), 440; *Eaton v. Nason*, 47 Me. 132; *Green v. Scranage*, 19 Iowa, 461; *Watson v. Thurber*, 11 Mich. 457; *Spear v. Ward*, 20 Cal. 659; *Ellis v. Kenyon*, 25 Ind. 134; *Philbrooks v. McEwen*, 29 Ind. 347; *Hubbard v. Ogden*, 22 Kans. 363; *Carley v. Fox*, 38 Mich. 387.

³ *Comegys v. Clarke*, 44 Md. 108; and see *Freeman v. Wilson*, 51 Miss. 329.

⁴ *Central Bank of Frederick v. Cope-land*, 18 Md. 305.

⁵ *Haskit v. Elliott*, 58 Ind. 493.

⁶ Acts 1879, p. 161, c. 67, § 10.

⁷ *Hawley v. Bradford*, 9 Paige (N. Y.), 200; *Demarest v. Wynkoop*, 3 Johns. (N.

⁸ *Bank of Albion v. Burns*, 46 N. Y. 170; *Coleman v. Van Rensselaer*, 44 How. (N. Y.) Pr. 368; *Smith v. Townsend*, 25

tion upon the mortgagee.¹ Her rights in this respect are the same as if she were sole.

The rule is otherwise where a married woman is held to bind her separate property generally by her contract in relation to any part of such property. Where this is the case she is bound as principal when she makes a mortgage to secure her husband's debt, and her liability is not affected by any understanding she may have with her husband, or by the giving of additional security as collateral to the mortgage.²

Generally she is entitled to have her estate exonerated out of the estate of her husband if this be practicable.³ When he has mortgaged or pledged his own property for the same debt, his property should in the first instance be applied to satisfy the mortgage.⁴ The creditor having security upon the husband's property for the payment of the same debt, by releasing this discharges the wife's estate.⁵ The husband being the principal debtor, if he acquire the mortgage it will be discharged.⁶ Although the right of redemption be limited to him, she may nevertheless redeem, unless it appear from the instrument itself or from extraneous evidence that she intended to make a gift of the property to her husband, and that the conveyance, therefore, should be absolute.⁷

To make the mortgagee chargeable with the equitable rights of the wife, as surety for her husband, it must appear that he had notice of this relation. Such notice cannot be inferred merely from the fact that the money was paid to the husband, because he may have acted as his wife's agent in the transaction. But if the mortgage be made to secure a preëxisting debt of the husband's, the creditor is affected with notice of the wife's equity as surety, and in his dealings with the husband is bound by this knowledge.⁸

N. Y. 479; *Spear v. Ward*, 20 Cal. 659; *White & Tudor Lead. Cas. in Eq.* (4th ed.) 1922, and cases cited.

¹ *Frickee v. Donner*, 35 Mich. 151.

² *Alexander v. Bouton*, 55 Cal. 15. See *Hassey v. Wilke*, 55 Cal. 525.

³ *Wilcox v. Todd*, 64 Mo. 388; *Shinn v. Smith*, 79 N. C. 310; *Huntingdon v. Huntingdon*, 2 Bro. P. C. 1.

⁴ *Wilcox v. Todd*, *supra*; *Loomer v. Wheelwright*, 3 Sandf. (N. Y.) Ch. 135; *Sheidle v. Weishlee*, 16 Pa. St. 134; *Johns v. Reardon*, 11 Md. 465; *Weeks v. Haas*,

3 W. & S. (Pa.) 520; *Knight v. Whitehead*, 26 Miss. 245; *Wright v. Austin*, 56 Barb. (N. Y.) 13; *Gahn v. Neimcewicz*, 3 Paige (N. Y.), 614; S. C. 11 Wend. 312.

⁵ *Ayres v. Husted*, 15 Conn. 504; *Johns v. Reardon*, 11 Md. 465.

⁶ *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29.

⁷ *Duffy v. Ins. Co.* 8 W. & S. (Pa.) 413, 433; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129.

⁸ *Loomer v. Wheelwright*, 3 Sandf. (N.

§§ 115, 116.] THE PARTIES TO A MORTGAGE.

In Kentucky, however, it is held that a married woman, who mortgages her real estate to secure debts of her husband, does not thereby become a surety of her husband, and entitled to a discharge when seven years shall have elapsed without suit after the cause of action has accrued, under a statute to that effect. The security takes the obligation out of the statute, which is interpreted to refer only to one who becomes a surety of another in an ordinary bond or obligation.¹

115. A husband has no presumptive authority to consent to an extension of a mortgage given by his wife to secure his debt. The holder of such a mortgage is chargeable with notice of her ownership, and that she stands in the relation of surety to the husband. The lien is therefore discharged by an extension of the time of payment without her concurrence.²

A husband has no implied authority to employ counsel to represent his wife, and to bind her in litigation respecting her separate estate.³

116. A married woman may make a valid contract to assume a mortgage in a conveyance to her of lands so incumbered, and may render herself liable for a deficiency.⁴ Such a contract is not an undertaking to pay the debt of another, but to pay her own debt for the benefit of her own estate. Having the capacity to make contracts for the acquisition of land, she must have the capacity of binding herself for the payment of the price of it. It is as much within her capacity to make an agreement to assume the payment of an existing mortgage, as it is to give a new mortgage and note for a part of the purchase money. She is bound by a vendor's implied lien for the purchase money of land conveyed to her;⁵ and by vendor's lien reserved in his deed or by contract.⁶

Y.) Ch. 135; Gahn v. Neimcewicz, 3 man v. Turner, 8 Hun (N. Y.), 78; S. C. Paige (N. Y.), 614; S. C. 11 Wend. 312; 69 N. Y. 280. See § 753.

Knight v. Whitehead, 26 Miss. 245.

¹ Hobson v. Hobson, 8 Bush (Ky.), 665.

² Bank of Albion v. Burns, 2 Lans. (N. Y.) 52; Smith v. Townsend, 25 N. Y. 479.

³ Mason v. Johnson, 47 Md. 347.

⁴ Huyler v. Atwood, 26 N. J. Eq. 504; Perkins v. Elliott, 23 Ib. 526, 533; Carpenter v. Mitchell, 54 Ill. 126; Ballin v. Dillaye, 35 How. (N. Y.) Pr. 216; S. C. 37 N. Y. 35; Flynn v. Powers, 35 How. (N. Y.) Pr. 279; S. C. 36 Ib. 289; Vroo-

An earlier case in the Supreme Court of New York held that a married woman was not liable in such case, because a purchase which turned out so poorly — the property not being worth the amount of the mortgage covenant — could not be for the benefit of her separate estate. Brown v. Hermann, 14 Abb. (N. Y.) Pr. 394.

⁵ § 193; Haskell v. Scott, 56 Ind. 564; Cox v. Wood, 20 Ind. 54; Thompson v. Scott, 1 Bradw. (Ill.) 641.

⁶ § 231.

117. In Alabama a married woman cannot bind either herself or her statutory estate by a mortgage made to secure debts contracted by her husband.¹ She is incapable of incumbering such estate by mortgage even to secure her own debt, although her husband joins in the conveyance. Her mortgage is an absolute nullity.² The statutes creating the wife's statutory separate estate define the debts to which it may be subjected and the remedy by which the liability for such debts may be enforced; consequently, even a mortgage given by husband and wife, to secure the payment of any such debt, cannot be enforced.³ A mortgage given by her in part payment of the purchase price of land at the time of the conveyance to her, although it imposes no personal liability upon her, is nevertheless valid and may be enforced in equity upon the land by foreclosure sale.⁴ The conveyance and mortgage, read together as parts of one instrument, in legal effect create in the grantor an estate upon condition; and, without reference to statutes removing the wife's common law disabilities, a court of equity would treat her as the trustee of the grantor, and would subject the land to the payment of the pur-

¹ *Davidson v. Lanier*, 51 Ala. 318; *Wilkinson v. Cheatham*, 45 Ala. 337; *Cowles v. Marks*, 47 Ala. 612; *Northington v. Faber*, 52 Ala. 45; *Fry v. Hamner*, 50 Ala. 52; *Riley v. Pierce*, 50 Ala. 93; *Coleman v. Smith*, 55 Ala. 368. But in case the land has been paid for by money drawn from the husband's firm, a mortgage by her of the land to secure a debt of the firm will not be set aside. *Mathews v. Sheldon*, 53 Ala. 136.

Code, 1867, §§ 2371, 2372, 2376. All property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage, in any manner, is the separate estate of the wife, and is not subject to the payment of the debts of the husband. Property thus belonging to the wife vests in the husband as her trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs, or legal representatives, for the rents, income, and profits thereof; but such rents, income, and profits are not subject to the payment of the debts of the husband. For all contracts for articles of comfort and support

of the household, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law, the separate estate of the wife is liable. This liability is enforced by action at law, against the husband alone, or against the husband and wife jointly. For construction of this statute see *Marks v. Cowles*, 53 Ala. 499; *Smith v. Carson*, 56 Ala. 456; *Strong v. Waddell*, 56 Ala. 471; *Revaisies v. Stoddart*, 32 Ala. 599; *O'Connor v. Chamberlain*, 59 Ala. 431; *Gilbert v. Dupree*, 63 Ala. 331.

² *Conner v. Williams*, 57 Ala. 131; *Chapman v. Abrahams*, 61 Ala. 108; *McDonald v. Mobile Life Ins. Co.* 56 Ala. 468; *Gans v. Williams*, 62 Ala. 41; *Thames v. Rembert*, 63 Ala. 561.

³ *Gilbert v. Dupree*, 63 Ala. 331.

⁴ *Marks v. Cowles*, *supra*, overruling *Cowles v. Marks*, 47 Ala. 612, and in part *Haygood v. Marlowe*, 51 Ala. 478. And see *Kieser v. Baldwin*, 62 Ala. 526; *Prout v. Hoge*, 57 Ala. 28; *Smith v. Carson*, 57 Ala. 456; *Strong v. Waddell*, 57 Ala. 471.

chase money.¹ If the husband assented to the transaction, a court of equity would compel him and the wife to execute a valid mortgage to secure the payment of the purchase money.²

A mortgage of a married woman's statutory separate estate, executed by herself and husband to secure the payment of their joint promissory note; is not binding upon her or her estate. The consideration of the note may be shown by parol to have been the indebtedness of the husband.³ But if the contract of purchase was made by the husband alone, though the conveyance was taken in the name of his wife, and the vendor had no notice of the wife's claim to the money, his equity under the mortgage is regarded as superior to hers.⁴

A distinction is taken between the statutory real estate of a married woman and that which is her equitable separate estate; and such an equitable separate estate may be created when the gift, or devise, or conveyance to her, clearly and certainly shows an intent to exclude the marital rights of the husband under the statute. Such separate estate not affected by the statute she can mortgage for her own debt or the debt of her husband, or of any one else, as if she were a *feme sole*.⁵

118. In Mississippi a married woman can make contracts binding her separate property only for certain purposes. In general, it may be said that she has no power to borrow money by mortgaging her real estate; but if the lender can show that the money was actually applied to discharge a debt for which her separate estate was already bound, or to make purchases for which she might charge her estate, then the lender may recover upon the property mortgaged.⁶ She cannot bind the corpus of

¹ Patterson v. Robinson, 25 Pa. St. 81; Ramborger v. Ingraham, 38 Pa. St. 146.

² Leach v. Noyes, 45 N. H. 364. The statute of Alabama does not diminish the capacity of the wife to take and receive property as recognized at common law. The statute relates to her common law incapacity to hold and transmit property, and partly removes this. At common law the right to disaffirm a conveyance to herself during coverture did not pertain to her, for the same reason that power to contract was denied her. Disaffirmance during coverture was within the power of the husband only, and not within his power after he had once assented to the transaction. In Marks v. Cowles, the hus-

band having assented to the purchase, the court decide that the husband, as trustee of the wife, having under the statute power to invest, with her concurrence, the proceeds of her statutory estate in the purchase of lands, the investment being a judicious one and such as a court of equity might have directed, the transaction of which the mortgage was a part should be sustained.

³ Stribling v. Bank of Kentucky, 48 Ala. 451.

⁴ Haygood v. Marlowe, 51 Ala. 478.

⁵ Short v. Battle, 52 Ala. 456; Helmetag v. Frank, 61 Ala. 67.

⁶ Allen v. Lenoir, 53 Miss. 321; Harmon v. Magee, 57 Miss. 410.

her property to pay her husband's debt:¹ it being provided by statute that "no conveyance or incumbrance for the separate debts of the husband shall be binding on the wife, beyond the amount of her income."² Although such a mortgage may be operative on her estate to that extent, it ceases to be operative upon it in any way upon her death.³ But during her lifetime the mortgagee, when entitled to possession after default, may maintain ejectment. The married woman may maintain a bill to redeem, or for an account against the mortgagee in possession.⁴

4. *Tenants in Common of Partnership Real Estate.*

119. Generally. — Land conveyed to members of a copartnership as tenants in common, but purchased with copartnership funds and used for copartnership purposes, is treated in equity as copartnership personal property. The creditors of the copartnership are in such case entitled to priority of payment out of it in preference to the creditors of individual members of the firm.⁵ But if one member of the copartnership mortgages his apparent interest as tenant in common of such land for a consideration paid him at the time, as, for instance, for a loan of money, the mortgagee having no notice of the character of the property in equity as copartnership property, he is entitled to hold it under his mortgage. He may rely upon the legal effect of the conveyance to his mortgagor, and upon his apparent title upon record. A person taking a mortgage without notice that it covers partnership property is a purchaser, and is subject to no equity in favor of the partnership or of its creditors.⁶

120. Notice of partnership equities. — A mortgage made by a partner of his interest in partnership real estate, to one who knows it to be such, is not a mortgage of the partner's undivided interest in such real estate, but of his interest in the portion mortgaged after the payment of the firm debts upon a settlement of

¹ *Klein v. McNamara*, 54 Miss. 90; *Viser v. Scruggs*, 49 Miss. 705; *Freeman v. Wilson*, 51 Miss. 329; and see *Dibrell v. Carlisle*, 51 Miss. 785; *Erwin v. Hill*, 47 Miss. 675.

² Code 1871, § 1778.

³ *Reed v. Coleman*, 51 Miss. 835.

⁴ *Stephenson v. Miller*, 57 Miss. 48.

⁵ *Pollock's Dig. of Law of Partnership*;

Story on Partnership, §§ 92, 93; *Hewitt v. Rankin*, 41 Iowa, 35; *Buchan v. Sumner*, 2 Barb. (N. Y.) Ch. 165; *Meily v. Wood*, 71 Pa. St. 488; *Hogle v. Lowe*, 12 Nev. 286; *Tarbel v. Bradley*, 7 Abb. (N. Y.) N. C. 273.

⁶ *Hewitt v. Rankin*, *supra*. *Hiscock v. Phelps*, 49 N. Y. 97.

the partnership accounts. The mortgage is not available until the partnership debts have been paid and the partnership accounts have been discharged, if the other partner chooses to assert his equity, or if subsequent partnership mortgagees assert their priority;¹ or if creditors of the partnership attach the property or levy an execution upon it as belonging to the partnership.² There would in such case be no distinction between debts incurred prior to the mortgage and those incurred subsequently.³ Upon the bankruptcy of the firm, the assignee, in behalf of the creditors, would be entitled to the property in preference.

If one partner, upon retiring from the partnership, conveys his interest in the partnership real estate to another person, who then comes in and forms a new firm, and this new partner executes a mortgage of such real estate to secure the purchase money, in the absence of any evidence that the mortgage was intended to be a mortgage of this partner's interest in the new firm, it is proper to regard it as a mortgage of the same partnership interest in the old firm which was conveyed to the new partner, and not of his interest in the new firm. Such a mortgage is subject to the payment of the debts of the old firm, but not to the payment of the debts of the new firm.⁴ But the mortgagee must be in the position of a *bond fide* purchaser for value; he must have parted with money or goods, or something valuable, in reliance upon the security. If he has simply taken the mortgage to secure an existing debt, or has knowledge of the facts which make the property in equity assets of the firm, then his mortgage will be postponed to the equities of those who have a right to have the property applied as assets of the copartnership.⁵ But a recital in a deed to three persons that the conveyance was in the proportion of an undivided half to one of them, and an undivided fourth to each of the others, "this being the proportional undivided interest of each of the above partners in the firm and lands" of the partnership, was held not necessarily to import notice to a mortgagee of the interest of one of the grantees of the equitable rights of the others as representing the creditors of the firm.⁶

¹ Beecher v. Stevens, 43 Conn. 587.

² Lovejoy v. Bowers, 11 N. H. 404; French v. Lovejoy, 12 N. H. 458; Fargo v. Ames, 45 Iowa, 491; Seaman v. Hufaker, 21 Kans. 254.

³ Lovejoy v. Bowers, *supra*.

⁴ Beecher v. Stevens, *supra*. See Phelps v. McNeely, 66 Mo. 554.

⁵ Hiscock v. Phelps, 49 N. Y. 97.

⁶ Van Slyck v. Skinner, 41 Mich. 186. But the decision in this case seems not to be quite in harmony with other authorities.

A mortgage by one partner of his interest in a mill and machinery in the continued use and occupation of the partnership, to secure such partner's individual debt, passes only what interest such partner may have after paying the debts of the copartnership.¹ The continued use of such property by the partnership is notice of the equitable rights of the partnership in the property.

If the description of the property in the mortgage itself shows that the property is that of a partnership, as where it is described as all the right, title, and interest of a partner individually, and as a member of a certain firm in all the real estate and other property of the firm, the mortgagee necessarily has notice of the partnership equities. The existence of such a mortgage cannot prevent the copartners from disposing of the real estate for the legitimate purposes of the copartnership, such as adjusting its affairs with creditors, or with each other. The recording of such mortgage is without effect upon the other members of the copartnership, or upon any one taking a conveyance made for partnership purposes.²

121. A valid mortgage may be made by one partner to secure a partnership debt upon partnership property. Where a copartnership carried on business in a store built by the firm upon land, the legal title of which was in A., and one of his copartners, to secure a copartnership debt, executed a mortgage of the land with the consent of his copartners, and in the firm name of A. & Co., and acknowledged the execution of it "as his free act and deed in behalf of said firm," it was held valid as against a person who, with actual notice of this, took a subsequent mortgage of the same property executed by A.³

An exception to the general rule, that an authority to bind another by an instrument under seal must itself be created by a like instrument, seems to have been established in the case of partners; they may give each other authority by parol to bind each other by instruments under seal.⁴ Some of the cases cited do not refer to conveyances of real estate. But if authority to execute a personal contract under seal may be implied from this relation, the same authority may as well extend to conveyances of real property. Lord Kenyon said, that if the relation of part-

¹ *Mechanics' Bank v. Godwin*, 5 N. J. Eq. (1 Halst.) 334.

² *Tarbel v. Bradley*, 7 Abb. (N. Y.) N. C. 273. See note to this case for decisions relating to partnership realty.

³ *Wilson v. Hunter*, 14 Wis. 683.

⁴ See *Wilson v. Hunter*, *supra*; *Cady v. Shepherd*, 11 Pick. (Mass.) 400; *Swan v. Stedman*, 4 Met. (Mass.) 548; *Smith v. Kerr*, 3 N. Y. 144.

§§ 122, 123.] THE PARTIES TO A MORTGAGE.

nership gave this authority in the one case, it "would extend to the case of mortgages."¹

An unauthorized mortgage of partnership property made by one partner using the name of his copartner may be ratified by the latter by parol, or by any act showing his recognition of the mortgage.² A mortgage of such real estate by one partner to secure a copartnership debt is valid;³ but it is not valid if made in opposition to the will of another partner with the knowledge of the creditor.⁴ There are authorities, however, which hold that such a mortgage, made without the previous authority of the other partner, binds only the interest of the partner executing it.⁵

122. On the other hand, if a partner mortgage his separate property to secure a partnership debt, he becomes a surety for the firm, and his separate creditors, upon his bankruptcy or insolvency, have a right to insist that the partnership property be first applied to the payment of the debt so secured.⁶

123. Upon the death of a partner holding such an interest in partnership real estate, his share descends to his heirs, but equity converts the legal title into a trust, to be devoted to the payment of partnership obligations, before it can be taken as a part of his separate estate.⁷ As against the partnership creditors there can be no dower in such land. But when such real estate is not required for the payment of the partnership debts, or the adjustment of accounts between the partners, it is to be treated as realty in the settlement of the estate, and is subject to dower. It is then treated in every way as real estate, and does not go to the personal representatives of the deceased. It is to be regarded as real estate and subject to all the rules applicable to real estate.⁸ The conversion of such real estate into personalty, for the purpose of the settlement of the partnership affairs, is a device of equity; and as soon as the reason of the rule ceases, by the closing of the partnership affairs without calling upon the real estate, the rule itself no longer applies.⁹ This equitable interference is

¹ *Harrison v. Jackson*, 7 T. R. 203.

² *Holbrook v. Chamberlin*, 116 Mass. 155.

³ *Cooley v. Hobart*, 8 Iowa, 358.

⁴ *Bull v. Harris*, 18 B. Mon. (Ky.) 195.

⁵ *Sutlive v. Jones*, 61 Ga. 676.

⁶ *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

⁷ *Wilcox v. Wilcox*, 13 Allen (Mass.),

252; *Burnside v. Merrick*, 4 Met. (Mass.)

537; *Dyer v. Clark*, 5 Ib. 562; *Howard v. Priest*, Ib. 582; *Piatt v. Oliver*, 3 McLean, 27.

⁸ *Foster's Appeal*, 74 Pa. St. 391; *Wilcox v. Wilcox*, *supra*; *Hewitt v. Rankin* 41 Iowa, 35, and cases cited.

⁹ Judge Story says, in his work on Partnership, § 93, that this is an open

not extended so as to convert all real estate into personalty for the purpose of a division.

A mortgage by an individual partner of such real estate is relieved of all equities in favor of the partnership, so soon as the business of the partnership is closed, without requiring the application of it to the firm debts.¹

5. Corporations.

124. A corporation has the power to mortgage its real estate as an incident to the power to acquire and hold it, and to make contracts in regard to it, when the power is not expressly denied, and is not inconsistent with the public obligations of the corporation.² A municipal corporation has also the power to mortgage its real estate.³ In general, it may be said that the *jus disponendi* of corporations is at common law unlimited. This right may of course be circumscribed by statute,⁴ or by the charters under which corporations are organized; and it is the case generally that corporations, to which are given large powers and valuable privileges, from the exercise of which it is expected the public will derive advantage, are impliedly restrained in their power of alienation. Railroad companies are of this class; they cannot mortgage their franchises or property essential to the continued operation of the roads without legislative authority;⁵ but an unauthorized mortgage, or one defectively executed, or securing bonds not properly drawn, may be subsequently confirmed by the legislature.⁶

question. But the authorities now seem decisive of the law as stated in the text.

¹ Hewitt v. Rankin, *supra*. See, also, Shearer v. Shearer, 98 Mass. 107, for an able opinion by Mr. Justice Wells.

² Aurora Agr. & Hort. Soc. v. Paddock, 80 Ill. 263; and see Angell & Ames on Corp. 153; Curtis v. Leavitt, 15 N. Y. 9; Thompson v. Lambert, 44 Iowa, 239.

³ Vanarsdall v. Watson, 65 Ind. 176.

⁴ One, for instance, requiring the written assent of a majority; Mass. Stat. of 1870, c. 224, § 15; or of two thirds of the stockholders. 2 R. S. of N. Y. p. 499, § 18. Such a statute is for their protection against the improvident acts of the officers, and is not enacted because mortgaging corporate property is improper in itself. Therefore a defect in the assent

to invalidate the mortgage must be material. Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328. See, also, Carpenter v. Blackhawk Gold Mining Co. 65 N. Y. 43.

⁵ Atkinson v. Marietta & Cinn. R. R. Co. 15 Ohio St. 21; Coe v. Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372; Commonwealth v. Smith, 10 Allen (Mass.), 448. The power of such companies to mortgage their property was regarded as necessarily implied in Kelly v. Ala. & Cincinnati R. R. Co. 58 Ala. 489.

This subject is barely mentioned in this treatise, because it is fully treated in the author's work on Railroad Securities.

⁶ Chapin v. Vermont & Mass. R. R. Co. 8 Gray (Mass.), 575; Shaw v. Norfolk County R. R. Co. 5 Ib. 162.

The right of a railroad company to construct a road, being given because of the benefit to the public arising from the use of the road, a power conferred upon it to mortgage its property is construed to confer upon the mortgagee, or a purchaser under the mortgage, all needful authority to use the road in a proper and beneficial manner, but no authority to take up and sell the material of which the road is made.¹

125. Lands not necessary for the business of a railroad. — But this limitation of the power of a railroad corporation to mortgage its real estate does not apply to lands not acquired to enable it to carry on the business which it was chartered to do for the benefit of the public, and not needed or used for that purpose. The alienation of such lands in nowise impairs or affects the usefulness of the company as a railroad corporation, or its ability to exercise any of its corporate franchises. Mr. Justice Foster, of Massachusetts,² in a case involving this point, said: "The recent cases in which railroad mortgages have been adjudged invalid by this court do not countenance any doubt of the power of a railroad company to sell and convey whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and maintain a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, in consideration of which its chartered privileges have been conferred." If a mortgage by a railroad company include lands which it can mortgage without distinct legislative authority, and also lands which it cannot convey without such authority, the mortgage will be upheld as to the former, but will be inoperative and void as to the latter.³

126. A religious corporation has in general, under our laws, the same right to mortgage and create liens upon its real estate that any corporation has. Having the power to hold and enjoy real estate, unless there be an express prohibition, it has the power to mortgage it.⁴

127. The power to mortgage resides primarily in the body corporate, or otherwise in the stockholders. They may author-

¹ *Palmer v. Forbes*, 23 Ill. 301.

² *Hendee v. Pinkerton*, 14 Allen (Mass.), 381.

³ *Hendee v. Pinkerton*, 14 Allen (Mass.), 381; *Jones on Railroad Securities*, § 12.

⁴ *Madison Av. Ch. v. Oliver St. Ch.* 41 N. Y. Superior Ct. 369; *Walrath v. Campbell*, 28 Mich. 111; *Methodist Episcopal Church v. Shulze*, 61 Ind. 511.

ize the execution of the deed by any agents they may by special vote, or general by-law, constitute for that purpose. The directors of a corporation, without authority either expressly or impliedly derived from the stockholders, have no right to execute a mortgage, or to authorize any one to do so. But even if the directors exceed their authority in borrowing money for the corporation, and executing a mortgage to secure the repayment of it, the corporation cannot, after enjoying the benefit of the loan, and acquiescing in the transaction, question their authority. The stockholders may restrain the directors, or other officers, in any attempt to transcend their powers; but if they remain silent, permitting them to execute mortgages upon their property, receiving the benefits of the loan, they are estopped to say that the officers were not authorized to do these acts.¹ A corporation ratifies a mortgage made by its directors by issuing bonds under it, and paying interest upon them.² The ratification may be through any acts which show that the corporation accepts the acts of its officers or agents;³ such as receiving and using the proceeds of such mortgage.⁴

A by-law of a corporation providing that in the management of its affairs the directors shall have all the powers which the corporation itself possesses invests them with power to borrow money, issue bonds, and convey in mortgage the lands of the corporation as security.⁵ Whether the directors of a corporation, in the absence of any restriction by charter or by-law, may, without further authority in behalf of the corporation, mortgage its property to secure debts they are authorized to incur,⁶ is left uncertain by the authorities; though in general the directors are regarded as having by implication all the power of the corporation in this regard.

128. Use of corporate seal. — A corporation cannot make a

¹ *Hotel Co. v. Wade*, 97 U. S. 13; *Aurora Agr. & Hort. Soc. v. Paddock*, 80 Ill. 263; *Ottawa Northern Plank Road Co. v. Murray*, 15 Ill. 336; *Bradley v. Ballard*, 55 Ill. 413.

² *McCurdy's Appeal*, 65 Pa. St. 290.

³ *Holbrook v. Chamberlin*, 116 Mass. 155, and cases cited.

⁴ *Cooks v. Watson*, 30 N. J. Eq. 345.

⁵ *Hendee v. Pinkerton*, 14 Allen (Mass.), 381.

⁶ *Jones on Railroad Securities*, § 84;

Hendee v. Pinkerton, *supra*, per Foster, J.; *Bank of Middlebury v. Rutland & Wash. R. R. Co.* 30 Vt. 159, 169; *Miller v. Rutland & Washington R. R. Co.* 36 Vt. 452, 474; *Sargent v. Webster*, 13 Met. (Mass.) 497, 503; *Burrill v. Nahant Bank*, 2 Met. (Mass.) 163; *Augusta Bank v. Hamblet*, 35 Me. 491; *Hoyt v. Thompson*, 19 N. Y. 207. See *Forbes v. San Rafael Turnpike Co.* 50 Cal. 340, where the power of the directors was limited.

valid mortgage of its real estate except by an instrument under its corporate seal.¹ But an impression of the seal of a corporation stamped upon and into the substance of the paper upon which the instrument is written is a good seal, although no wax, wafer, or other adhesive substance be used.² This is so held in states where the distinction between sealed and unsealed instruments is inflexibly preserved. But where a scroll is not treated as a seal, a fac-simile of the seal of a corporation printed with ink on the paper is not a valid seal.³ "No definition of a seal has ever been made," says Mr. Justice Foster,⁴ "and none can be suggested, liberal enough to include the method adopted in that case, which would not destroy the distinction uniformly adhered to in the usage and judicial decisions of this state. If we should pronounce every scroll a seal, we should speedily be called upon to take the next step of pronouncing every flourish to be a scroll, and nothing would remain of the ancient formality of sealing."

6. *A Power to Mortgage.*

129. As a general rule, a power to sell and convey real estate does not confer a power to mortgage, and a mortgage executed under a power of attorney, authorizing the attorney to sell and convey only, is void.⁵ A devise of so much of the testa-

¹ *In re St. Helen Mill Co.* 3 Sawyer, 88; *Eagle Woolen Mills Co. v. Monteith*, 2 Oregon, 277, 285; *Koehler v. Black River Falls Iron Co.* 2 Black, 715.

² *Hendee v. Pinkerton*, 14 Allen (Mass.), 381. "After our own courts have allowed wafers instead of wax, and paper, with gum or mucilage, instead of wafers, there seems little reason why we should hesitate also to allow the sufficiency of an impression of a corporate seal on the paper itself. The extent to which this practice has prevailed among corporations; the fact that the seals of all our own courts have been from an early period of the same description; the sanction of numerous decisions in other states, and in the federal courts; the convenience and unobjectionable character of the usage, are arguments in its favor too powerful to be resisted, in the absence of any decisive authority to the contrary." Per Foster, J. And see article 1 Am. Law Rev. 638, by Geo. S. Hale, Esq.

³ *Bates v. Boston & N. Y. Cent. R. R. Co.* 10 Allen (Mass.), 251.

⁴ *Hendee v. Pinkerton*, 14 Allen (Mass.), 381.

Rauch v. Oil Co. 8 W. Va. 36: a deed of trust reciting a corporation as the grantor, but having the following attestation: "Witness the signature and seal of William Scott, president of said Blennerhassett Oil Co., and who is legally authorized by the board of directors of said company to make this grant, this date aforewritten. William Scott (Seal);" the corporate seal not being used, was held not to be the deed of the corporation.

⁵ *De Bouchout v. Goldsmid*, 5 Ves. 211; *Australian, &c. Co. v. Mounsey*, 4 K. & J. 733; *Bloomer v. Waldron*, 3 Hill (N. Y.), 361; *Morris v. Watson*, 15 Minn. 212; *Colesbury v. Dart*, 61 Ga. 620.

Otherwise in Pennsylvania: *Lancaster v. Dolan*, 1 Rawle (Pa.), 231; *Zane v. Kennedy*, 73 Pa. St. 182; *Presbyterian Corporation v. Wallace*, 3 Rawle (Pa.),

tor's estate as may be sufficient for the maintenance of the devisee during his life, "he having full power to sell and convey any and all of my real estate, at any time, if necessary to secure such maintenance," does not give to the devisee the right to mortgage the estate in fee.¹ The power should expressly declare the intention that the agent should have authority to mortgage the property. A general power may be sufficient if it appears that the principal intended his agent should have authority to raise money on mortgage, and the nature of the business intrusted to him is such as to make it proper for him to exercise this power.² A power to lease on mortgage real estate for the purpose of procuring money thereon, in case the attorney cannot sell the property, gives him the option to mortgage it, in the event he cannot sell at a reasonable price.³ A power to sell for the expressed purpose of raising money is held to imply a power to give a mortgage which is only a conditional sale.⁴ A power by will, or otherwise, to raise a sum of money upon certain land authorizes either an absolute sale or a mortgage, as may be deemed expedient.⁵

A power to mortgage given in general terms, without specifying the provisions the deed shall contain, includes the power to make it in the form and with the provisions customarily used in the state or country where the land is situated. Thus such a power to mortgage given in England, or in some American states, would authorize the giving of a mortgage with a power of sale;⁶ while in states in which such a power is not in general use a power inserted without special authority would be void. And in regard to any other provision, as, for instance, that forfeiting credit on the mortgage upon any default in the payment of in-

109; *Gordon v. Preston*, 1 Watts (Pa.), 385; *Duval's Appeal*, 38 Pa. St. 112, 118; *Penn. Life Ins. Co. v. Austin*, 42 Pa. St. 257.

¹ *Hoyt v. Jaques*, 129 Mass. 286, per Morton, J. "The two transactions of a sale and a mortgage are essentially different. A power to sell implies that the attorney is to receive for the benefit of the principal a fair and adequate price for the land; a power to mortgage involves a right in the attorney to convey the land for a less sum, so that the whole estate may be taken on a foreclosure for only a part of its value. So, under a will, a trust

with a power to sell *primâ facie* imports a power to sell 'out and out,' and will not authorize a mortgage, unless there is something in the will to show that a mortgage was within the intention of the testator."

² See *Contant v. Servoss*, 3 Barb. (N. Y.) 128.

³ *Mylius v. Copes*, 23 Kans. 617.

⁴ *Powell on Mortg.* c. 4; *Mills v. Banks*, 3 P. Wms. 1; *Page v. Cooper*, 16 Beav. 396; *Oxford v. Albermarle*, 17 L. J. N. S. Ch. 396.

⁵ *Wareham v. Brown*, 2 Vern. 153.

⁶ See chapter xI; *Wilson v. Troup*, 7 Johns. (N. Y.) Ch. 25; *S. C. 2 Cow.* 195.

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terest, and giving the mortgagee the option thereupon to consider the whole sum due, a general power to mortgage would authorize its use in some states, while the same power would not authorize it in others.¹

130. Mode of exercising the power.—It is a rule of conveying that a deed by an attorney must be executed in the name of the principal. In *Combe's case*,² "it was resolved that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act, of him who gives the authority."

A mortgage by a corporation must be executed in its name by the agent or officer authorized to act for it. Although it may purport to be the mortgage of a corporation, yet if executed by its attorney or officer in his individual name, it is not the legal mortgage of the corporation, and does not bind it except in equity.³

Although not bound by the act of an agent in giving a mortgage, the principal may ratify it by taking the benefit of it, or may otherwise so act with reference to the exercise of the power as to preclude himself from attempting to invalidate the security.⁴

PART II.

WHO MAY TAKE A MORTGAGE, 181-185.

131. In general any one capable of holding real estate may be a mortgagee. The disabilities which prevent the making of a valid mortgage in no case prevent the taking of a mortgage, which is for the benefit of the mortgagee. An infant may take a mortgage. He is bound by the conditions of the deed, which must be wholly good or void altogether.⁵

A director or stockholder of a private corporation is not debarred by his relation to the corporation from loaning money to

¹ See § 76; *Jesup v. City Bank of Racine*, 14 Wis. 331.

² 9 Coke, 75; and see *Copeland v. Mercantile Ins. Co.* 6 Pick. (Mass.) 198; *Elwell v. Shaw*, 16 Mass. 42.

³ *Love v. Sierra Nevada, L. W. &*

Mining Co. 32 Cal. 639; and see *Brinley v. Mann*, 2 Cush. (Mass.) 337; *Sargent v. Webster*, 13 Met. (Mass.) 497.

⁴ *Perry v. Holl*, 2 Gif. 138; S. C. 2 De G., F. & J. 38.

⁵ *Parker v. Lincoln*, 12 Mass. 16.

it, and taking a mortgage from it for security; but he must act fairly and in good faith.¹

132. Aliens. — In the United States aliens are generally empowered to hold real estate. But aside from any statutory privilege, a mortgage being regarded as a personal interest, the debt the principal thing, and the land merely an incident, an alien is held entitled to hold and enforce a mortgage.²

133. A married woman may at common law be a mortgagee; but she cannot enforce a foreclosure of a mortgage of which the equity of redemption is held by her husband, either by suit at law or in equity, or by entry to foreclose in the presence of two witnesses. Though her title as mortgagee still continues, she is debarred from all proceedings to foreclose the mortgage during the continuance of the marriage relation.³

But there are decisions that a mortgage or other conveyance, made directly from a husband to his wife, is in equity valid and may be enforced.⁴

134. A corporation, whether private⁵ or municipal,⁶ though not expressly authorized by its charter or by statute to take a mortgage, if not prohibited may do so, provided only it be in furtherance of the objects for which it was created. A railroad company, when not forbidden to take anything but money in payment for its stock, may take mortgages of real estate securing notes or bonds given for the stock.⁷

A bank organized under the national banking act⁸ is authorized to take and hold a mortgage of real estate by way of security for debts previously contracted;⁹ but not to take such a mortgage as security for a debt contracted at the time or for future advances. Such a mortgage was till recently regarded as in-

¹ *Harts v. Brown*, 77 Ill. 226.

² *Hughes v. Edwards*, 9 Wheat. 489.

³ *Tucker v. Fenno*, 110 Mass. 311. See *Campbell v. Galbreath*, 12 Bush (Ky.), 459.

⁴ *Wochoska v. Wochoska*, 45 Wis. 423; *Putnam v. Bicknell*, 18 Wis. 333. In the former case the wife enforced her rights after a divorce, and in the latter case after the death of her husband.

⁵ *Gordon v. Preston*, 1 Watts (Pa.), 385; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Madison, &c. Plank Road Co. v. Wauertown, &c. Plank Road Co.* 5 Wis. 173.

⁶ *Vanarsdall v. Watson*, 65 Ind. 176;

State Bank of Bay City v. Chapelle, 40 Mich. 447.

⁷ *Clark v. Farrington*, 11 Wis. 306; *Blunt v. Walker*, Ib. 334; *Cornell v. Hichens*, Ib. 353; *Lyon v. Ewings*, 17 Wis. 61; *Andrews v. Hart*, Ib. 297; *Western Bank of Scotland v. Tallman*, Ib. 530; *National Trust Co. v. Murphy*, 30 N. J. Eq. 408; *Massey v. Citizens' Building Asso.* 22 Kans. 624.

⁸ 1864, June 3, §§ 8, 28.

⁹ *Allen v. First Nat. Bk. of Xenia*, 23 Ohio St. 97; *Heath v. Second Nat. Bank of Lafayette*, 70 Ind. 106; *Scofield v. State Nat. Bank*, 9 Neb. 316.

valid.¹ Therefore, a mortgage made to a national bank by a customer, as collateral security for the payment of all notes then discounted and held by the bank, "or for any other indebtedness now due, or that may hereafter become due," was regarded a valid security only for the indebtedness existing when it was given; and upon the payment of such indebtedness, and the surrender of the specific notes constituting such indebtedness, the mortgage was discharged.² The Supreme Court has recently, however, established a different and more reasonable construction of the prohibition in the national banking act of a loan made upon real estate security, declaring that although such a loan is prohibited it is not void. A mortgage taken in violation of the prohibition is valid and may be enforced. The remedy for the violation is a forfeiture of the bank's charter.³ The statute authorizes banks to hold real estate in mortgage for debts previously contracted. It does not in terms, but only by implication, prohibit a loan on real estate. It does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain results of litigation and judicial decision. In other instances contracts are not void where they are not in terms made so. Thus, where a corporation is made incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. In conclusion, Judge Swayne, delivering the opinion of the court, said: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for

¹ *Kansas Valley Bank v. Rowell*, 2 S. C. 19 Alb. L. J. 132; 18 West. Jür. Dill. 371; *Crocker v. Whitney*, 71 N. Y. 161; *Fowler v. Scully*, 72 Pa. St. 456; *Ripley v. Harris*, 3 Biss. 199.

² *Crocker v. Whitney*, 71 N. Y. 161; *Woods v. People's Nat. Bank of Pittsburgh*, 83 Pa. St. 57.

³ *Nat. Bank v. Matphews*, 98 U. S. 621; 228.

the wanton violation of a charter, and it may be made to follow whenever the public authority shall see fit to invoke its application. A private person cannot directly or indirectly usurp this function of government."¹ Where a bank already holds a mortgage upon land, and for its own protection pays the amount of a prior lien, and then takes a mortgage for this sum, the transaction does not come within the prohibition of the statute as to taking mortgages for debts concurrently created.²

Where a state bank was authorized to hold mortgages, but it was provided by statute that all conveyances of real estate should be made to the president of the bank, it was held that a mortgage directly to the bank was valid notwithstanding;³ for it was considered that the object was not to prohibit the bank from taking title, but merely to facilitate business by permitting conveyances to be made for the benefit of the bank to an officer of it.

In a few states foreign corporations have at different times been prohibited from making loans and taking security upon real estate therefor. A mortgage within such a prohibition is invalid from its delivery, and consequently a sale and conveyance under it is nugatory, and does not divest the owner of his interest in the mortgaged premises.⁴

135. Joint mortgagees. — A mortgage given to secure a joint debt creates a joint estate in the mortgagees.⁵ Payment to either

¹ Supporting this view, see *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. 370; *Baird v. Bank of Washington*, 11 S. & R. (Pa.) 411; *Graham v. Nat. Bank of N. Y.* 32 N. J. Eq. 804.

² *Ornn v. Merchants' Nat. Bank*, 16 Kans. 341.

³ *Kennedy v. Knight*, 21 Wis. 340.

⁴ Such was the statute in Illinois prior to the act of 1875 (Laws of 1875, p. 65), repealing the former statute, and confirming and validating prior loans made in contravention of it. *Scammon v. Commercial Union Assurance Co.* 6 Bradw. 551; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483.

In *Pennsylvania* a foreign corporation may enforce a mortgage upon lands in that state. *Leasure v. Union Mut. Life Ins. Co.* 91 Pa. St. 491.

⁵ *Appleton v. Boyd*, 7 Mass. 131.

In *Massachusetts* mortgages are expressly excepted from the provision of statute that conveyances made to two or more persons shall be construed to create

estates in common. Gen. Sts. c. 89, § 14. It leaves the nature of the estate open to inquiry.

In *Maine* a mortgage to two or more persons is considered as constituting a joint tenancy unless otherwise expressed. Acts 1881, c. 46; R. S. 1871, c. 73, § 13.

In *Minnesota* it is provided that all mortgages heretofore made of any real property or of any interest therein, to any partnership or firm, in their partnership or firm name, which mortgages have been foreclosed by advertisement pursuant to the statute relating to foreclosure by advertisement, in the name of the said partnership or firm, be and the same are, together with all proceedings had in such foreclosure, hereby legalized and confirmed so far as relates to any question of defect by reason of the mortgagees' names being stated in said mortgages by their partnership or firm name instead of the individual names of the members of said partnership or firm. Laws 1881, c. 140.

satisfies the mortgage.¹ In case of the death of one of such mortgagees, an action to recover the debt or to enforce the mortgage may be maintained in the name of the survivor.² But a mortgage given to two or more persons to secure their several debts is several and not joint; each mortgagee has a right to enforce his claim under the mortgage, in a form adapted to the case, and of course the surviving mortgagee cannot maintain an action on the mortgage to enforce payment of the debt due the deceased mortgagee.³ The mortgage is presumed to be for the benefit of the mortgagees *pro rata* to the debts secured; ⁴ though if the amount of the debts be not fixed, the mortgage might be presumed to be for their benefit equally. Such a mortgage does not constitute the mortgagees trustees one for the other, at least before the law day.⁵

But whether the debt secured be joint or several, after foreclosure the mortgagees become tenants in common of the land.⁶

A mortgage to husband and wife upon the death of the husband vests in the wife.⁷

A mortgagee of an undivided half of a parcel of land does not become a tenant in common with the owner of the other half, until his title has become absolute by a completed foreclosure. Before that time the mortgage is only a lien, and the estate is to be dealt with as belonging to the mortgagor.⁸

¹ Wright v. Ware, 58 Ga. 150.

² Blake v. Sanborn, 8 Gray (Mass.), 154; Webster v. Vandeverter, 6 Ib. 428; Mut. L. Ins. Co. of N. Y. v. Sturges, 32 N. J. Eq. 678.

³ Gilson v. Gilson, 2 Allen (Mass.), 115, 117; Burnett v. Pratt, 22 Pick. (Mass.) 556; Brown v. Bates, 55 Me. 520.

⁴ Adams v. Robertson, 37 Ill. 45; Wil-

lis v. Caldwell, 10 B. Mon. (Ky.) 199.

See Jones on Chattel Mortgages, § 84.

⁵ Bates v. Coe, 10 Conn. 280, 293.

⁶ Goodwin v. Richardson, 11 Mass. 469; Randall v. Phillips, 3 Mason, 378; Donnels v. Edwards, 2 Pick. (Mass.) 617; Burnett v. Pratt, *supra*.

⁷ Draper v. Jackson, 16 Mass. 480.

⁸ Norcross v. Norcross, 105 Mass. 265, and cases cited.

CHAPTER IV.

WHAT MAY BE THE SUBJECT OF A MORTGAGE.

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|---|---------------------------------------|
| I. Existing interests in real property, | II. Accessions to the mortgaged prop- |
| 136-148. | erty, 149-161. |

1. *Existing Interests in Real Property.*

136. Every kind of interest in real estate may be mortgaged if it be subject to sale and assignment.¹ It does not matter that it is a right in remainder or reversion, a contingent interest, or a possibility coupled with an interest, if it be an interest in the land itself.² But an interest in the proceeds of land ordered to be sold and distributed among legatees is not a subject of mortgage.³ A mere personal right or interest, as, for instance, a right of preëmption of public lands, is of course not susceptible of mortgage; ⁴ yet the land subject to preëmption may be mortgaged.⁵

The Code of California states the general rule of law upon this subject, in the provision that any interest in real property which is capable of being transferred may be mortgaged.⁶

Such, for instance, is the interest of one who holds an agreement or bond for title; ⁷ and even the interest of one in possession under a parol contract to purchase; ⁸ or the interest of the holder of school land certificates until forfeited by non-fulfilment

¹ *Neligh v. Michenor*, 11 N. J. Eq. 539; *Miller v. Tipton*, 6 Blackf. (Ind.) 238; *Dorsey v. Hall*, 7 Neb. 460.

² *Wilson v. Wilson*, 32 Barb. (N. Y.) 328; *In re John & Cherry Streets*, 19 Wend. (N. Y.) 659; *Wilson v. Russ*, 17 Fla. 691.

³ *Gray v. Smith*, 3 Watts (Pa.), 289.

⁴ *Penn v. Ott*, 12 La. Ann. 233; *Gilbert v. Penn*, 12 La. Ann. 235; *Broussard v. Dugas*, 5 La. Ann. 585.

A court of equity will not set aside a mortgage made by a preëmtor, for the reason that the statute prohibits him from perfecting his preëmption after he has

executed a mortgage, and that he gave the mortgage in ignorance of the law. *Douglas v. Gould*, 52 Cal. 656.

⁵ *Whitney v. Buckman*, 13 Cal. 536.

⁶ Civil Code, § 2947.

⁷ *Laughlin v. Braley*, 25 Kans. 147; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Crane v. Turner*, 7 Hun (N. Y.), 357; *S. C. 67 N. Y. 437*; *Farmers' Loan & Trust Co. v. Curtis*, 7 N. Y. 466; *Smith v. Patton*, 12 W. Va. 541.

⁸ *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Bull v. Sykes*, 7 Wis. 449; *Hagar v. Brainerd*, 44 Vt. 294.

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of the conditions of sale,¹ or of a certificate of stock in an unincorporated company representing an interest in real estate.²

A mere possibility or expectancy, not coupled with any interest in or growing out of the property, cannot be made the subject of a mortgage.³ A mere expectancy of acquiring property, without a present interest in it, is not a subject of sale, and therefore not of mortgage. "The next cast of a fisherman's net" has long been used as an illustration of a mere expectancy, not the subject of grant. In a late case in Massachusetts it was sought to substantiate such a sale, and the court were obliged to adjudge that a man has no salable interest in halibut in the sea. There is a possibility, they say, the man may catch halibut, but he has no actual or potential interest in the fish until he has caught them.⁴

137. An estate tail may be mortgaged by the life tenant. Such tenant cannot prejudice the rights of the remaindermen, but can convey whatever interest he has.⁵ A contingent or possible interest may also be the subject of a mortgage.⁶ Reversions and remainders, being capable of assignment, may be the subject of a mortgage.⁷

138. A mortgage passes the interest of the mortgagor whatever it may be. When a mortgage is made of an estate or interest already incumbered in any manner, the mortgage of course attaches only to the interest then remaining in the mortgagor. Upon the discharge of any prior incumbrance, the mortgage interest has the full advantage of the discharge. If the mortgagor acquires any title after making the mortgage, that, as a general rule, accrues to the benefit of the mortgage title.

Although the mortgage purports to convey a title in fee simple, when the mortgagor has only an equitable title, it is effectual to pass such equitable title, and the record of it is notice to subsequent purchasers of the mortgagor's interest.⁸

Unless the conveyance in mortgage be limited in its operation

¹ *Mowry v. Wood*, 12 Wis. 413; *Dodge v. Silverthorn*, 12 Wis. 644; *Jarvis v. Dutcher*, 16 Wis. 307.

² *Durkee v. Stringham*, 8 Wis. 1.

³ *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570. See *Hoff v. Burd*, 17 N. J. Eq. 201.

⁴ *Low v. Pew*, 108 Mass. 347. The other maxim (not of the law) is applicable: "First catch your fish," &c.

⁵ *Hosmer v. Carter*, 68 Ill. 98. The limitation was to "her body heirs."

⁶ *Wilson v. Wilson*, 32 Barb. (N. Y.) 328.

⁷ 2 Story Eq. Jur. § 1021; *Curtis v. Root*, 20 Ill. 518, 522.

⁸ *Lincoln Building & Saving Assn. v. Hass*, 10 Neb. 581; *Laughlin v. Braley*, 25 Kans. 147.

it passes all the interest of the mortgagor in the property described. It passes any reversionary interest he has ; for instance, a mortgage of land subject to a homestead right conveys the reversionary interest after the expiration of the homestead estate, although the wife did not join in it.¹ If there be an outstanding contract of sale of which notice is imparted by the record or by the vendee's possession, the mortgage is subject to the vendee's right to purchase ; and upon a foreclosure and sale under the mortgage, the purchaser takes the property subject to the same right.²

A mortgage may be made of any imperfect title which the mortgagor has, as, for instance, an imperfect Spanish title which was subject to sale and assignment.³

A clause in a mortgage, "excepting therefrom so much of said tracts as have been conveyed by the mortgagor by deed to different individuals," does not reserve from its operation a portion of the premises covered by a prior unrecorded mortgage.⁴

A mortgage of several lots of land described by numbers on a plan, and by courses and distances, will pass all the title the mortgagor has in the lots, although he has only a mortgage title to one of them.⁵ But where a mortgagor became the husband of the mortgagee, and the two joined in a second mortgage of the premises to secure a prior debt of the husband, it was held that the wife's interest under the first mortgage was not thereby affected. She had not joined in the mortgage to assign her own mortgage, but to effectually pass the equity of redemption.⁶ So a mortgage of all the land and right to land which the grantor has in a certain town does not include land to which he has only a possibility of a reversion on the non-performance of a condition subsequent.⁷

139. There may be a mortgage of a mortgage. One may mortgage an interest in real estate which he himself holds in mortgage.⁸ He conveys all the interest he has ; and if he afterwards acquire an absolute title, the second mortgagee by foreclosing his mortgage acquires an absolute estate.⁹ If a married

¹ *Smith v. Provin*, 4 Allen (Mass.), 516; *McGuire v. Van Pelt*, 55 Ala. 344.

² *Lavery v. Moore*, 33 N. Y. 658.

³ *Massey v. Papin*, 24 How. 362.

⁴ *Eaton v. White*, 18 Wis. 517.

⁵ *Murdock v. Chapman*, 9 Gray (Mass.), 156.

⁶ *Power v. Lester*, 23 N. Y. 527.

⁷ *Richardson v. City of Cambridge*, 2 Allen (Mass.), 118.

⁸ *Cutts v. York Manuf. Co.* 18 Me. 190. This point was not before the court. But see *Hudson City Sav. Inst. v. McArthur*, 8 N. Y. W. Dig. 63.

⁹ *Murdock v. Chapman*, *supra*. See *Power v. Lester*, *supra*.

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woman having a mortgage upon her husband's land unite with him in the granting part of the deed and in the covenants, she conveys her mortgage interest;¹ but if having such a mortgage she join her husband in a subsequent mortgage merely to release her dower and homestead, she does not thereby subject her mortgage interest to the lien of the latter mortgage.²

140. A mortgage may be made of rents due under a lease, and although a right of entry be given to the mortgagee the mortgage is a mere security, like any other mortgage of real estate, and the mortgagor remains the real owner until foreclosure and sale.³ A mortgage may be made of a ditch for mining purposes, the grantee having authority to collect the rents and profits of it.⁴

141. A mortgage given by one part owner of land upon purchasing the remaining portion, which describes the whole parcel, is construed to embrace the entire interest, and not merely the undivided interest conveyed by the mortgagee.⁵

The owner of certain land having conveyed an undivided half of it by a deed fully describing it, afterwards conveyed the remaining undivided half to the same grantee, and received from him at the same time a mortgage conveying "the following real estate in Stamford: viz., the same and all the real estate described in the deed of the said grantor to me dated Nov. 18, 1847," the first named deed. The mortgage was construed to cover the whole title and interest acquired by the mortgagor by the two deeds, and not merely the undivided half conveyed to him by the former deed.⁶

A mortgage by a tenant in common of a moiety of land passes only his interest, although he at the time holds a power from the owner of the other moiety, and the mortgage purports to be of the whole estate, if it does not purport to be made by virtue of his power from the other owner, as well as in his own right.⁷

142. The mortgage of a building carries with it the land on which it stands and which is essential to its use, if such appears to have been the intention of the parties.⁸ Thus a mortgage made to secure advances to enable the mortgagor to erect a

¹ *Gregory v. Gregory*, 16 Ohio St. 560.

⁶ *Carpenter v. Millard*, 38 Vt. 9.

² *Kitchell v. Mudgett*, 37 Mich. 81.

⁷ *Shirras v. Caig*, 7 Cranch, 34.

³ *Van Rensselaer v. Dennison*, 35 N. Y. 393.

⁸ *Wilson v. Hunter*, 14 Wis. 688; and see *Whitney v. Olney*, 3 Mason, 280; *Esty v. Baker*, 48 Me. 495; *Doyle v. Lord*, 64

⁴ *Kidd v. Teeple*, 22 Cal. 255.

⁵ *Potts v. Blanchard*, 19 La. Ann. 167. N. Y. 433, 436.

building on leased land of "all his right, title, and interest, which he now has in the foundation or stone work of said building, and which he may have in and unto said building, during its erection and completion, and after it is completed," passes the land on which the building stands.¹ The right which the grantor has in the foundation, stone work, and building is not merely or mostly a right to the materials of which they are composed, but the right of having them on the premises as part of a structure, with the right to use and occupy them for a long period of time. It is a grant of his right to use and occupy the land under the lease.

As a general rule, a building erected upon the land of another becomes a part of the realty, and it is only by an express agreement that one can have a separate property in such a building as a chattel, with a right to remove it. If one having a contract for the purchase of a lot of land erect a house upon it, in pursuance of an agreement that he will do so, and that on receiving a deed of the land he will mortgage it to the owner to secure the purchase money, he cannot, before receiving a deed of the land, mortgage the house as personal property to another. This agreement, instead of being an agreement that the house may be held separate from the land, is in effect an agreement that the building and land shall be united and held together.²

143. House moved from the land. — A mortgage was made of a lot of land upon which was a dwelling-house. Subsequently, and without the knowledge or consent of the mortgagee, the mortgagor removed the house from the lot upon which it stood, and placed it upon an adjoining lot. It was held that the mortgagee retained his lien upon the dwelling-house, and that the house might be sold after first applying the lot covered by the mortgage towards satisfying it. The adjoining lot was owned by the wife of the mortgagor, and the removal was with her knowledge.³ By agreement, express or implied, between the owner of real estate and the owner of buildings, the latter may annex the buildings to the realty, without their becoming part of it. So in the case stated, the house did not necessarily become a part of the lot upon which it was placed by the removal. Under such circumstances

¹ *Greenwood v. Murdock*, 9 Gray § 637; and *Jones on Chattel Mortgages*, (Mass.), 20. § 123.

² *Milton v. Colby*, 5 Met. (Mass.) 78.

Or the mortgagee might maintain trespass. *Smith v. Goodwin*, 2 Me. 173. See

³ *Hamlin v. Parsons*, 12 Minn. 108; and see *Hutchins v. King*, 1 Wall. 53; §§ 453, 638.

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there is no reason why the mortgagee should not have the benefit of the security for which he contracted. No question arises in this case as to the effect of substantial alterations in the building, which might sometimes affect or change the title to property altered from its original form. Such was the case where a mortgagor removed a dwelling-house from the mortgaged premises, and used the materials in the construction of a house upon another lot of land, and afterwards sold the house and lot. The materials having thus become a part of the freehold, the right of property therein vested in the grantee of the land; and therefore the mortgagee could not maintain trover against the purchaser, either for the new house or for the old materials used in its construction.¹

144. Whether fixtures severed from the realty become personal property, and when taken away from the realty are freed from the lien of the mortgage, is a question upon which the authorities are divided.² A house having been floated off the lot covered by the mortgage into an adjacent street by a flood was sold by the owner to a person who had notice of all the circumstances. An action was brought to foreclose the mortgage upon the land and the house then standing in the street. The court

¹ Peirce v. Goddard, 22 Pick. (Mass.) 559. "The general rule is," says Mr. Justice Wilde, "that the owner of property, whether the property be movable or immovable, has the right to that which is united to it by accession or adjunction. But by the law of England as well as by the civil law, a trespasser who wilfully takes the property of another can acquire no right in it on the principle of accession, but the owner may reclaim it, whatever alteration of form it may have undergone, unless it be changed into a different species and be incapable of being restored to its former state; and even then the trespasser, by the civil law, could acquire no right by the accession, unless the materials had been taken away in ignorance of their being the property of another. But there are exceptions to the general rule. It is laid down by Molloy as a settled principle of law, that if a man cuts down trees of another, or takes timber or plank prepared for the erecting or repairing of a dwelling-house, nay, though some of them are for shipping, and builds a ship, the property follows, not the own-

ers but the builders. Mol. de Jure Mar. lib. 2, c. 1, § 7. . . In the present case it cannot be questioned that the newly erected dwelling-house was a part of the freehold, and was the property of the mortgagor. The materials used in its construction ceased to be personal property, and the owner's property in them was divested as effectually as though they had been destroyed. It is clear, therefore, that the plaintiff could not maintain an action, even against the mortgagor, for the conversion of the new house. And it is equally clear that he cannot maintain the present action for the conversion of the materials taken from the old house. The taking down of that house and using the materials in the construction of the new building was the tortious act of the mortgagor, for which he alone is responsible."

² Hill v. Gwin, 51 Cal. 47; Gardner v. Finley, 19 Barb. (N. Y.) 317, hold that the lien is lost. But *contra*, see Hutchins v. King, 1 Wall. 53, 59, per Field, J., cited below; Dorr v. Dudderar, 88 Ill. 107; § 688.

held that the house was effectually removed from the operation of the mortgage lien; and that so far as the legal effect of the removal was concerned it was immaterial whether the severance was by the act of God, as in this case, or the act of man.¹ But in a case before the Supreme Court of the United States,² Mr. Justice Field declared that the mortgage covers the timber after it is cut and removed from the land as well as before; that the sale of it by the mortgagors does not divest the mortgage lien; that the purchaser of the timber takes it subject to this paramount lien; and that the holders of the mortgage can follow it and take possession of it, and hold it until the amount due upon the mortgage is paid. But what the effect of the severance of fixtures is depends very largely upon the view taken as to the nature and effect of a mortgage; whether it be regarded as a conveyance of the legal title to the property, giving the mortgagee also the right of possession, or whether it be regarded merely as a lien, and the mortgagor is protected in his possession until foreclosure. On the one hand the mortgagee's legal ownership or his actual or constructive possession enable him to follow and recover the property severed; but on the other hand he has merely a right to restrain the removal of the property by injunction, or after the removal at most only a right to recover damages for wrongfully impairing his security.³

145. A mortgage of wood not standing on the land of the mortgagor is a mortgage of personal property, and a record of it as a mortgage of real estate is ineffectual.⁴ But growing wood or timber is a portion of the realty, and is embraced in a mortgage of the land.

146. A mortgage of improvements conveys no title to the land itself. It passes only a right to the improvements placed upon the land by the mortgagor, or an equitable right to compensation for them in case the owner of the land should take posses-

¹ *Buckout v. Swift*, 27 Cal. 433. Mr. Justice Shafter, delivering the opinion of the court, said: "A building, severed and removed from mortgaged lands, of which lands it formed a part when the mortgage was given, is disincumbered of the lien, substantially on the same principle that a building, erected upon the lands after the giving of the mortgage, is subject to the lien. In the first case the building is withdrawn from the operation of the

mortgage, for the reason that it has ceased to be a thing real; in the other, mere materials are brought under the lien, for the reason that they have become a structure by combination, and the structure has become a thing real by position."

² *Hutchins v. King*, 1 Wall. 53, 59. And see *Gore v. Jenness*, 19 Me. 53.

³ See § 453.

⁴ *Douglas v. Shumway*, 13 Gray (Mass.), 498.

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sion. A subsequent acquisition of the title to the land by the mortgagor does not in such case enure to the benefit of the mortgagee.¹ A mortgage of a building erected on leased land under an agreement that the lessee might remove it, or the lessor should pay for it at its appraised value, is a mortgage of realty falling within the designation of a chattel real at common law.²

147. The lien of a mortgage extends to all improvements and repairs subsequently made upon the mortgaged premises, whether made by the mortgagor or by a purchaser from him without actual notice of the existence of the mortgage.³ Thus a mortgage of a ditch or flume in process of construction includes, without any special mention, all improvements or fixtures then on the line located for the flume, as well as those which may afterwards be put thereon.⁴

148. An abstract of title delivered by the owner of land to the mortgagee's attorney, for the purpose of decreasing the expenses of searching the title, may be regarded as part of the security for the loan, and accordingly it has been held that the mortgagor is not entitled to the possession of it until the mortgage is paid. In case of a sale of the mortgage, or of a foreclosure, it would be necessary that the mortgagee should have it, or that another should be made.⁵

2. *Accessions to the Mortgaged Property.*

149. At common law, nothing can be mortgaged that does not belong to the mortgagor at the time the mortgage is made.⁶ "It is a common learning in the law, that a man cannot grant or charge that which he hath not."⁷ He must have a present property, either actual or potential, in the thing sold or mortgaged.⁸ Therefore at law, although a mortgage in terms is made to cover after-acquired property, yet after such property is acquired, an

¹ Mitchell v. Black, 64 Me. 48.

² Griffin v. Marine Co. of Chicago, 52 Ill. 130.

³ Martin v. Beatty, 54 Ill. 100; Rice v. Dewey, 54 Barb. (N. Y.) 455; Wharton v. Moore, 84 N. C. 479.

⁴ Union Water Co. v. Murphy's Flat Fluming Co. 22 Cal. 620.

⁵ Holm v. Wust, 11 Abb. (N. Y.) Pr. N. S. 113.

⁶ Jones on Chattel Mortgages, § 138;

Moody v. Wright, 13 Met. (Mass.) 17; Jones v. Richardson, 10 Ib. 481; Pierce v. Emery, 32 N. H. 484; Amonett v. Amis, 16 La. Ann. 225; Ross v. Wilson, 7 Bush (Ky.), 29; and see Coe v. Columbus, Piqua & Ind. R. R. Co. 10 Ohio St. 372, 391; Lunn v. Thornton, 1 Com. B. 379.

⁷ Perkins, tit. Grant, § 65.

⁸ Looker v. Peckwell, 38 N. J. L. 253; Smithurst v. Edmunds, 14 N. J. Eq. 408; Benjamin on Sales, §§ 78-84.

execution levied upon it as the property of the mortgagor, or a sale by him, will prevail over the mortgage.¹

But a different rule prevails in equity.² Judge Story, after an elaborate examination of the question, in stating the result of it says: "It seems to me the clear result of all the authorities, that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy."³

150. Products of the soil. — Upon this principle a valid mortgage may be made by an owner, or lessee in possession of land, of a crop to be raised by him the coming season, or of crops to be grown within a certain period.⁴ It is a general rule that a thing which has a potential existence may be mortgaged. "Land is the mother and root of all fruits," says Lord Hobart.⁵ "Therefore he that hath it may grant all fruits that may arise from it after, and the property shall pass as soon as the fruits are extant."

A landlord has no such interest in, or title to, crops grown on the rented lands as can be made the subject of a valid mortgage.⁶

A mortgage of grain "now standing and growing" in the field

¹ Looker v. Peckwell, *supra*, and cases cited.

² Langton v. Horton, 1 Hare, 549; Little Rock & Fort Smith Ry. Co. v. Page, 35 Ark. 304.

In a recent case in Kentucky, however, it is said that if such a mortgage is enforceable in equity at all, it can only be enforced as a right under the contract, and not as a trust attached to the property. Ross v. Wilson, 7 Bush (Ky.), 29.

³ Mitchell v. Winslow, 2 Story, 630; and see Smithurst v. Edmunds, *supra*.

⁴ Jones on Chattel Mortgages, § 142; Arques v. Wasson, 51 Cal. 620; Lehman v. Marshall, 47 Ala. 362; Jones v. Webster, 48 Ala. 109; and see Van Hoozer v. Cory, 34 Barb. (N. Y.), 9, 12; Stover v. Eycleshimer, 3 Keyes (N. Y.), 620.

See *contra*, at law, Milliman v. Neher, 20 Barb. (N. Y.) 37; Barnard v. Eaton, 2 Cush. (Mass.) 294, per Shaw, C. J.; Comstock v. Scales, 7 Wis. 159; Hutchinson v. Ford, 9 Bush (Ky.), 318; Booker v. Jones, 55 Ala. 266. See, however, Tomlinson v. Greenfield, 31 Ark. 557; Redd v. Burrus, 58 Ga. 574; Gittings v. Nelson, 86 Ill. 591.

⁵ Grantham v. Hawley, Hobart, 132. He further remarks that "a person may grant all the tithe wool that he shall have in such a year; yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially."

⁶ Broughton v. Powell, 52 Ala. 123.

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does not cover, as against an attaching creditor, grain which had at the time of the execution of the mortgage been cut.¹

Under a mortgage of a greenhouse and nursery, together with the shrubs and plants belonging to the same, new plants and shrubs, the growth of cuttings from those growing at the time of the mortgage pass to the mortgagee by accession.²

151. Crops not sown. — A valid mortgage of a crop before it is raised may be made by an owner or lessee of land,³ and although the seed of it has not been sown.⁴ A person having the right by parol agreement to sow certain land with wheat upon shares with the owner of the land, may, after sowing the wheat, make a valid mortgage of his interest in the crop, which will cover the interest of the mortgagor in the land.⁵ A mortgage of crops by one who is cultivating a farm upon shares covers only his share.⁶ Possession by a prior mortgagee of a crop is notice of his rights to subsequent purchasers.⁷ The mortgage in equity attaches as soon as the crop comes into existence.⁸

The crop is a chattel merely after it is gathered, and a mortgage of it, to take effect when it is gathered should be recorded as a chattel mortgage; but a growing crop attached to the soil may be an interest in the real estate; so that a mortgage of such

¹ Ford v. Sutherlin, 2 Mon. 440.

² Bryant v. Pennell, 61 Me. 108. The plaintiff attached so much of the stock of plants and shrubs as were not covered by the mortgage. His counsel claimed that the maxim, "*Partus sequitur ventrem*," did not apply; that it might as well be contended that trees raised from the seed of apples picked from a mortgaged tree passed under the mortgage, as to say the cuttings did.

³ See § 150; Jones on Chattel Mortgages, § 143; Ellett v. Butt, 1 Woods, 214; Robinson v. Mauldin, 11 Ala. 977; Everman v. Robb, 52 Miss. 653.

⁴ Butt v. Ellett, 19 Wall. 544; Apperson v. Moore, 30 Ark. 56; Comstock v. Scales, 7 Wis. 159.

The statute of Mississippi, providing that mortgages may be made of cotton crops to be produced within fifteen months, is merely declaratory of the law, with a limitation as to the time within which the crop must be produced. Act Feb. 18, 1867; Sillers v. Lester, 48 Miss. 513;

Ellett v. Butt, 1 Woods, 214. In this state mortgages and deeds of trust may be made to cover growing crops, or crops to be grown within fifteen months from the making of such mortgage or deed, which are valid on the interest of the mortgagor or grantor in such crop, but are subject to any lien in favor of the landlord for the rent of the property. Such mortgages must be recorded in a separate book, entitled a chattel deed book. Laws 1876, pp. 100, 113.

In Arkansas, mortgages may be made of crops already planted, or to be planted, and are binding upon such crops and their products. And a laborer may mortgage his interest in a crop for supplies furnished him. Acts 1875, p. 230.

⁵ Shuart v. Taylor, 7 How. (N. Y.) Pr. 251.

⁶ McGee v. Fitzer, 37 Tex. 27.

⁷ Grimes v. Rose, 24 Mich. 416.

⁸ Butt v. Ellett, 19 Wall. 544; Apperson v. Moore, 30 Ark. 56; Lehman v. Marshall, 47 Ala. 362.

interest should be recorded as a mortgage of real estate.¹ When properly recorded one who purchases and removes the crop, without the knowledge of the mortgagee, takes it subject to the rights of the mortgagee, who may recover the property if it can be identified, and if not, he may recover the value of it from such purchaser.² The mortgagee is entitled to the possession of the crop, when it is matured and gathered, and may then maintain an action to recover it or its value.³ Such a mortgage passes a mere equitable interest while the crop is growing, but after severance the equitable interest ripens into a legal title.⁴ If the crop be severed and sold without the consent of the mortgagee, he may recover the value of it from a purchaser, although he has purchased it in the usual course of trade, and without actual notice. The record is constructive notice. The removal of the crop is not such a change in the property as will divest the title of the mortgagee.⁵

152. A mortgage by a railroad company specifically covering after-acquired property is binding in equity upon real estate and personal property afterwards purchased for the use of the road, as against the mortgagors and all persons claiming under them, except purchasers for value and without notice; and especially will it bind such property, as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage.⁶ If the mortgage in distinct terms covers after-acquired property, the record of the mortgage is sufficient notice of the lien. "Whenever a mortgage is made by a railroad company to secure bonds, and the mortgage declares that it shall include all present and after-acquired property, as soon as the property is acquired the mortgage operates upon it. In other words, it seizes the property or operates upon it by way of estoppel, as soon as it comes into existence and is in possession of the mortgagor; and the mortgagees, under such circumstances, have a prior equity to the claims of creditors obtaining judgments and executions after the property is thus acquired and placed in possession of the mortgagor."⁷ Such is the settled law

¹ *Butler v. Hill*, 57 Tenn. 375.

² *Duke v. Strickland*, 43 Ind. 494.

³ *Lehman v. Marshall*, 47 Ala. 362; *Adams v. Tanner*, 5 Ib. 740; *Robinson v. Mauldin*, 11 Ala. 977.

⁴ *Maulden v. Armistead*, 14 Ala. 702; S. C. 18 Ala. 500.

⁵ *Duke v. Strickland*, 43 Ind. 494.

⁶ *Stevens v. Watson*, 4 Abb. (N. Y.) App. Dec. 302.

This subject is fully examined in Jones on Railroad Securities, §§ 121-153, and no attempt is here made to make more than a brief reference to it.

⁷ Per Drummond, J., in *Scott v. Clinton & Springfield R. R. Co.* 8 Chicago Legal News, 210.

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of the federal courts;¹ and generally of the state courts as well.² The rule is applied equally to real estate and personal property; to mortgages by individuals as well as those made by corporations.³

153. Rule as to after-acquired property. — A conveyance of what does not exist does not operate as a present transfer in equity any more than it does in law. The difference is merely that at law the conveyance, having nothing to operate upon, is void; while in equity what is in form a conveyance operates, by way of present contract, to take effect and attach to the subject of it as soon as it comes into being; the agreement to convey then ripens into an actual transfer.⁴

Equity considers as done that which the mortgagor has distinctly agreed to do, and is in consequence bound to do. Upon every acquisition of property within the description contained in the mortgage, a decree might be obtained that the mortgagor should execute a mortgage of such property; but instead of actually following out this troublesome process, equity treats the mortgage as already attaching to the newly-acquired property as it comes into the mortgagor's possession, or, in other words, considers that of every article of property as acquired there was an

¹ *Pennock v. Coe*, 23 How. 117; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459, 481; *Dunham v. Cinn., Peru, &c. Railway Co.* 1 Wall. 254; *Mitchell v. Winslow*, 2 Story, 630.

² *Pierce v. Mil. & St. Paul R. R. Co.* 24 Wis. 551; *Hoyle v. Plattsburgh & Montreal R. R. Co.* 51 Barb. (N. Y.) 45; *Seymour v. Canandaigua, & Niagara Falls R. R. Co.* 25 Ib. 284; *Benjamin v. Elmira, Jeff. & Can. R. R. Co.* 49 Ib. 441; S. C. 54 N. Y. 675; *Sillers v. Lester*, 48 Miss. 513; *Howe v. Freeman*, 14 Gray (Mass.), 566; *Coopers v. Wolf*, 15 Ohio St. 523; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Morrill v. Noyes*, 56 Me. 458; *Phila., W. & Balt. R. R. Co. v. Woelpper*, 64 Pa. St. 366.

³ *Holroyd v. Marshall*, 10 H. L. Cas. 191, overruling *dictum* of Baron Parke in *Mogg v. Baker*, 3 M. & W. 195. The latter case was followed by the Supreme Court of Massachusetts in *Moody v. Wright*, 13 Met, 17, holding that property not in existence at the time of making the mort-

gage is incapable of being conveyed by it.

In the District Court for Massachusetts the doctrine of the state courts was dissented from in the recent case of *Brett v. Carter*, 2 Lowell, 458, where it was held that a mortgage of after-acquired chattels is valid against the assignee in bankruptcy of the mortgagor. See same case in 3 Central Law Journal, 286, and an article upon it in the same volume, p. 359. See, also, in same volume, p. 608, decision of Judge Clifford, in the case of *Barnard v. Norwich & Worcester R. R. Co.*, before the Circuit Court of the United States, reported also in 14 N. B. R. 469.

See *Jones on Chattel Mortgages*, § 138-175, for a full discussion of the subject of mortgages of future personal property both at law and in equity.

⁴ *Emerson v. European & N. A. Ry. Co.* 67 Me. 387; *Mitchell v. Winslow*, 2 Story, 630, 644, where the cases are reviewed; *Christy v. Dana*, 34 Cal. 548; *Amonett v. Amis*, 16 La. Ann. 225.

actual mortgage then executed in fulfilment of the mortgagor's contract.

The chief question, therefore, is, whether the parties to the mortgage intended that the after-acquired property, which is in any case the subject of litigation, should be subject to the lien of the mortgage; and it will be noticed that in the recent cases the contention is generally upon this question. .

154. Applied to railroad companies. — A mortgage which by its terms covers property which a railroad company may afterwards acquire, though given before any part of the road is built, covers after-acquired property contemplated by the mortgage.¹ It attaches to the property as it comes into existence. As against the railroad company and its privies, the after-acquired property feeds the estoppel created by the deed. Even against a contractor who has at his own expense finished a railroad under contract that he shall keep possession until he has been paid, a mortgage in such terms will pass the road afterwards built and acquired.² A mortgage of its line of road, its tolls and revenues, covers all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues.³ A mortgage by a railroad company of "all the present and future to be acquired property of the company, including the right of way and land occupied, and all rails, and other materials used therein or procured therefor," includes the rolling stock of the road.⁴ A mortgage on a road with its engines, depots, and shops then owned by the company, or which it might thereafter acquire, "with the superstructure, rails, and other materials used thereon," is construed to embrace wood provided for the use of the road from time to time.⁵

155. After-acquired property may pass as an incident to the franchise, and as an accession to the subject of the mortgage.⁶ The suggestion that a mortgage by a railroad company made in

¹ *Willink v. Morris Canal & Banking Company*, 4 N. J. Eq. (3 Gr.) 377, 402; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 481; *Jones on Railroad Securities*, § 147.

² *Dunham v. Cinn., Peru, &c. Railway Co.* 1 Wall. 254.

³ *State v. Northern Central R. R. Co.* 18 Md. 193.

⁴ *Pullan v. Cincinnati & Chicago R. R. Co.* 4 Biss. 35; and see, also, *Hoyle*

v. Plattsburgh & Montreal R. R. Co. 51 Barb. (N. Y.) 45.

⁵ *Coe v. McBrown*, 22 Ind. 252. See *Bath v. Miller*, 53 Me. 308.

⁶ *Stevens v. Buffalo, Corning & N. Y. R. R. Co.* 45 How. (N. Y.) Fr. 104. The decision was not, however, based upon this proposition. See *Rowan v. Sharp's Rifle Manuf. Co.* 29 Conn. 282; *Chew v. Barnet*, 11 S. & R. (Pa.) 389; *Pierce v. Emery*, 32 N. H. 484.

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pursuance of its charter, or of a law authorizing it, attaches to subsequently acquired property, for the reason that the franchise by virtue of which the property was acquired itself passed by the mortgage, was noticed by the Supreme Court of Wisconsin. The court, however, while questioning the reason so assigned, held that when a mortgage by express terms covers lands that may be subsequently acquired for the uses of the company, the lien will attach to such lands the moment the company acquires an interest in them, although this interest be only a contract of purchase. The mortgagee may compel a conveyance under such a contract, and the company cannot impair the lien by a sale without the mortgagee's consent.¹ But in a case before the Court of Appeals of Kentucky the power of a corporation to pass by its mortgage after-acquired property was placed altogether upon this ground, the court saying that the power to pledge the franchises and rights of the corporation implies, as incident thereto, the power to pledge everything that may be necessary to the enjoyment of the franchise, and upon which its real value depends. When a railroad mortgage is made which is to continue for many years, new cars and engines and materials of different kinds will become necessary from time to time, and the road would be of little value without them; therefore if included in a mortgage they are effectually covered by it.²

On the principle of accession it has been held that without particular mention of the property afterwards acquired, a mortgage by a railroad company of all its property and rights of property will pass property afterwards acquired and essential to its use, even as against other creditors who claim by later mortgages. Such a mortgage is regarded as in substance a conveyance of the road and franchise as an entire thing, and the subsequently acquired property as becoming a part of it by accession, and as incident to the franchise; and therefore a cargo of railroad iron, after it is delivered to the railroad company, becomes subject to the lien of such a mortgage.³

This doctrine rests upon the authority of a few cases, and is not generally supported. Mortgages of after-acquired property, although made by corporations, are made to rest upon the broad equitable principles applicable to such mortgages in general.

¹ *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114; *Hill v. La Crosse & Milw. R. R. Co.* 11 Wis. 214; *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 11 Wis. 207; S. C. 15 Wis. 424.

² *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 445.

³ *Pierce v. Emery*, 32 N. H. 484.

156. A mortgage by a railway company does not by implication cover property not essential to its business, unless it is specifically described by the terms of the mortgage. Thus a mortgage by a railroad company of its real estate, road, bridges, ferries, locomotives, engines, cars, and all other personal property belonging to it, does not include canal boats run in connection with the road beyond its terminus.¹ Town lots, held by a railroad company, do not pass by a sheriff's sale, under a mortgage of the road, "with its corporate privileges and appurtenances," when they are not directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises.² A mortgage of the stock, materials, and every other kind of personal property which shall be used for operating a railroad, does not profess to cover railroad chairs afterwards bought by the company, but which were never used by it.³ A mortgage which does not purport to cover materials subsequently acquired is not made valid as to such materials from any consideration of the nature and object of the mortgage, as, for instance, that it was made for the purpose of raising money to complete the road.⁴

A mortgage by a railroad company of its road and real estate then owned by it, or which it might afterwards acquire, is considered an equitable mortgage as to the property subsequently acquired for the purpose of its road, and is a valid lien upon after-acquired land so taken and used.⁵ Any property connected with the use of its franchise, whether real or personal, either already or subsequently acquired, may be effectually mortgaged.⁶ Upon foreclosure of such a mortgage, the property and rights of the corporation as they exist at the time of the foreclosure pass to the mortgagees or to the purchasers.⁷

157. After-acquired land not within the terms of the mortgage is not covered by it. Thus a mortgage by a railroad company of its road and appurtenances, and of lands after acquired for stations, shops, and the like uses, does not create any lien upon a tract of woodland afterwards acquired, situate seven miles

¹ *Parish v. Wheeler*, 22 N. Y. 494.

² *Shamokin Valley R. R. Co. v. Livermore*, 47 Pa. St. 465.

³ *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 11 Wis. 207.

⁴ *Farmers' Loan & Trust Co. v. Commercial Bank of Racine*, 15 Wis. 424.

⁵ *Benjamin v. Elmira, Jefferson & Can-*

andaigua R. R. Co. 49 Barb. 441; S. C. 54 N. Y. 675; *Seymour v. Canandaigua & Niagara Falls R. R. Co.* 25 Barb. 284.

⁶ *Coe v. Peacock*, 14 Ohio St. 187; *Raymond v. Clark*, 46 Conn. 129.

⁷ *Miller v. Rutland, & Wash. R. R. Co.* 36 Vt. 452.

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from its road, although purchased and used by the company for the purpose of supplying the road with timber and wood; for such a mortgage contains no apt words to embrace land remote from the road, and which cannot be used for any of the specific purposes mentioned.¹

The authority of a company to bind its future acquisitions by mortgage is limited to such property as it has the power by law to acquire; and therefore it has been held that a railroad company having at the time of making a mortgage no power by its charter or by general law to accept a land grant from the United States, its mortgage, though broad enough in terms to cover such a grant, would not embrace a land grant subsequently made, and which the company was by special act afterwards empowered to accept.² But a railroad company having the authority to accept a land grant, may undoubtedly mortgage it before it has fulfilled the conditions upon which the grant is to be made.³ A mortgage by a railroad company in its terms embracing all property which it may subsequently acquire includes a lease it afterwards takes of another railroad.⁴

158. The mortgage is subject to any liens there may be upon the property when acquired. The mortgage attaches to the property in the condition in which it comes into the mortgagor's hands. If it be at that time already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. "It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase money, the deed which he receives, and the mortgage which he gives, are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment, or recognizance, can displace such mortgage for purchase money. And in such cases a failure to register the mortgage for purchase money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors."⁵ Thus a

¹ *Dinsmore v. Racine & Miss. R. R.* R. Co. 14 N. Bank. R. 469; S. C. 3 Cent. Co. 12 Wis. 649; and see *Walsh v. Barton*, 24 Ohio St. 28. L. J. 608.

² *Meyer v. Johnston*, 53 Ala. 237, 331.

³ See *Campbell v. Texas & New Orleans R. R. Co.* 2 Woods, 263.

⁴ *Barnard v. Norwich & Worcester R.*

⁵ *United States v. New Orleans Railroad*, 12 Wall. 362-365, per Bradley, J.; *Willink v. Morris Canal & Banking Co.* 3 Green (N. J.) Ch. 377.

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mechanic's lien for work done and materials furnished on such after-acquired property takes precedence of the mortgage.¹ Property subsequently acquired under a conditional sale comes under the mortgage subject to the terms of such sale.² Property afterwards acquired through fraud is not affected by an existing mortgage.³

159. An equitable right of action may be the subject of a mortgage, if the intention to include it be made apparent. But whether a covenant of the purchaser of a portion of a railroad to pay a portion of the mortgage debt, and in case of default to allow the company to reënter upon the premises and sell them under foreclosure, would pass by a subsequent mortgage given by the company, conveying the road with its franchises and all "causes of action, demands, and choses in action, of whatever nature," is questionable. The fact that the subsequent mortgage was expressly made subject to the prior mortgage for the payment of a portion of which such covenants were given would probably prevent their passing.⁴

A right of way for a railroad may be pledged as security for a loan, and upon default may be sold and transferred so as to vest the easement in the purchaser.⁵

160. A mortgage may be made of the future net earnings of a railroad company to secure the payment of interest upon its construction bonds.⁶ Even a mortgage of a railroad and its present and subsequently acquired property is a prior lien upon the net earnings of the road while the mortgagor retains possession.⁷ A mortgage of tolls and revenues covers only the net income after the payment of all expenses.⁸ But until the mortgagee takes possession, the earnings belong wholly to the railroad company and are subject to its control.⁹ Even after the road has passed into the possession of a receiver appointed by court in

¹ *Williamson v. N. J. Southern Ry.* Co. 28 N. J. Eq. 277, 298; S. C. 29 Ib. 311.

² *Haven v. Emery*, 33 N. H. 66; *Taylor v. Burlington, Cedar Rapids & Minn. Ry.* 11 West. Jur. 337.

³ *Williamson v. N. J. Southern Ry. Co. supra.*

⁴ *Milwaukee & Minn. R. R. Co. v. Milwaukee & West. R. R. Co.* 20 Wis. 174.

⁵ *Junction R. R. Co. v. Ruggles*, 7 Ohio St. 1.

⁶ See *Jones on Railroad Securities*, §§ 114-120; *Jessup v. Bridge*, 11 Iowa, 572; *Dunham v. Isett*, 15 Iowa, 284; *Farmers' Loan & Trust Co. v. Cary*, 13 Wis. 110.

⁷ *Hale v. Frost*, 98 U. S. 389.

⁸ *Jones on R. R. Securities* § 117; *Parkhurst v. Northern Cent. R. R. Co.* 19 Md. 472.

⁹ *Fosdick v. Schall*, 99 U. S. 235, 253.

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the interest of the bondholders, the net earnings may be applied by the receiver to the payment of claims having equities superior to those of the bondholders.¹

161. A mortgage by a railroad company of its road and franchise, as security for debt, is held not to convey its corporate existence, or its general corporate powers, but only the franchise necessary to make the conveyance beneficial to the grantees, and to enable them to maintain and manage the road, and receive the profits to their own use.²

¹ *Hale v. Frost*, 99 U. S. 389.

Rutland & Washington R. R. Co. 36 Vt.

² *Eldridge v. Smith*, 34 Vt. 484; *Meyer* 452, 498.
v. Johnston, 53 Ala. 237, 325; *Miller v.*

CHAPTER V.

EQUITABLE MORTGAGES.

- | | |
|---|---|
| I. By agreements and informal mortgages, 163-171. | II. By assignments of contracts of purchase, 172-178. |
| | III. By deposits of title deeds, 179-188. |

162. **Introductory.** — It has been noticed that a conveyance, accompanied by a condition contained either in the deed itself or in a separate instrument executed at the same time, constitutes a legal mortgage, or a mortgage at common law. In addition to these formal instruments which are properly entitled to the designation of mortgages, deeds and contracts which are wanting in one or both of these characteristics of a common law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases, and gives effect to their intentions. Mortgages of this kind are therefore called equitable mortgages.

There are many kinds of equitable mortgages — as many as there are varieties of ways in which parties may contract for security by pledging some interest in lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage.¹ It is not even necessary that the contract should be in express terms a security; for equity will often imply this from the nature of the transactions between the parties. For instance, a contract for security is, in England and in some States of America, implied from a deposit of title deeds.

It has been noticed in the preceding chapter, that rights and interests in realty which are only equitable are often the subject of mortgage; that in equity formal mortgages are often made to embrace property which at common law would not be covered at all; as, for instance, property acquired after the execution of the

¹ Quoted with approval in *Hall v. Mobile & Montgomery Ry. Co.* 58 Ala. 10, 22.

mortgage. But the term equitable mortgage is used more properly with reference solely to the kind of instrument or contract by which equity establishes a lien. It is the equitable form of the transaction, rather than the equitable nature of the property, to which this chapter has reference.

There are some kinds of equitable mortgage so common and so important that they will be treated of at length farther on; as, for instance, absolute conveyances without any defeasance except by parol, and liens of vendors under written contracts or reservations. In this chapter, therefore, the less important transactions which in equity are recognized as creating securities will be treated of.

1. *By Agreements and Informal Mortgages.*

163. An agreement to give a mortgage, not objectionable for want of consideration, is treated in equity as a mortgage, upon the principle that equity will treat that as done which by agreement is to be done. This doctrine has been asserted frequently, both in this country and in England.¹ It is of frequent application under the bankrupt laws, where it operates to make valid a mortgage given to a creditor, shortly before the filing of a petition in bankruptcy by the mortgagor, when this is done in pursuance of an agreement made at a time when the giving of the mortgage would not have been a fraudulent preference.²

An agreement to make a conveyance of land, when intended as security for a debt, is in the same manner a mortgage. But all such agreements to give mortgages or other conveyances by way of security are ineffectual when no particular property is specified on which the security is to be given.³ An agreement to give a mortgage on sufficient property is not effectual.⁴ Such agreement can of course bind only the maker of it and his heirs, and

¹ *Russel v. Russel*, 1 Bro. C. C. 269; *Lamoille Valley R. R. Co.* 52 Vt. 144; *Biebinger v. Continental Bank*, 99 U. S. 143; *Cotterell v. Long*, 20 Ohio, 464; *Richardson v. Hamlett*, 33 Ark. 237; *Chase v. Peck*, 21 N. Y. 581; *In re Oliva v. Bunaforza*, 31 N. J. Eq. 395; *Howe*, 1 Paige (N. Y.), 125; *Morrow v. Boehl v. Wadgymar*, 54 Tex. 589. See, however, *Humphreys v. Snyder*, *Morris* (Iowa), 263.
² *Burdick v. Jackson*, 7 Hun (N. Y.), 488.
³ *Langley v. Vaughn*, 10 Heisk. (Tenn.) 553.
⁴ *Adams v. Johnson*, 41 Miss. 258.

persons having notice. It is not of any force as against his subsequent judgment creditors.¹

The meaning of the maxim, that equity looks upon things agreed to be done as actually performed, is that equity will treat the matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.²

164. It is not even necessary that the agreement should in all cases be in writing. Although a parol agreement in respect to lands while it remains altogether executory is not enforceable, yet when there has been a part performance of it, it cannot in equity be avoided. When such parol agreement has been performed by a delivery of a formal mortgage, all objection to the validity of the agreement is removed, and it becomes as effectual for all purposes as if it had been reduced to writing originally. In this way a mortgage made a few days before the bankruptcy of the mortgagor, but in pursuance of a parol agreement made fifteen months before, and based upon a good consideration, is good against the assignee in bankruptcy, and is not open to the objection that it is void as a fraudulent preference.³

165. Upon this principle, the entry of an agreement by a corporation upon its records, that a certain bond for title should be pledged to certain of its members as security for liabilities, which they were about to incur for the company, was held to be an equitable mortgage; and although a deed of trust was afterwards made in conformity with the resolution, yet these members having acted upon the faith of it before the deed of trust was made were held to be entitled to the security as from that time, and the deed of trust was regarded only as a confirmation of the agreement, and as having relation to the resolution.⁴

The maker of two notes gave an instrument to his sureties on the notes reciting that they were given for the purchase of land, and providing, "In case I fail to pay said notes, I do bind myself, my heirs, &c., to convey to said sureties the aforesaid land." It was held that upon the failure of the principal to pay the notes

¹ Price v. Cutts, 29 Ga. 142; Racouillat v. Sansevain, 32 Cal. 376.

But in England an equitable mortgage has priority of a subsequent judgment. Whitworth v. Gaugain, 3 Hare, 416; Abbott v. Stratten, 3 Jo. & Lat. 603.

² Daggett v. Rankin, 31 Cal. 321, 326, per Currey, C. J.

³ Burdick v. Jackson, 7 Hun (N. Y.), 488.

⁴ Miller v. Moore, 3 Jones (N. C.) Eq. 431.

the sureties were entitled, not to an absolute conveyance, but to a mortgage.¹

166. An instrument which does not transfer the legal estate may yet operate as an equitable transfer of it in the nature of a mortgage. Thus, a mortgage to certain executors from which the word "heirs," creating a fee, was omitted, and the word "successors" used in its stead, was held to be an equitable mortgage in fee and was reformed.² Such was held to be the effect of an agreement under seal made by one to whom land was conveyed in consideration that he should support and maintain the grantor, whereby the produce of the land was pledged for that purpose, and if that should prove insufficient, the entire fee was appropriated.³ Such, too, is a similar instrument, in which the signer agrees to maintain his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them "each and severally a life lien or dower or lien of maintenance for life" in real estate.⁴ The words, "we mortgage the property," accompanied by a provision for the sale of it upon non-payment of money thus secured, have been held sufficient to create a mortgage.⁵

An instrument whereby a corporation "pledges the real and personal estate of said company," for the fulfilment of a contract, may be enforced as a mortgage against the company, and all persons claiming under it with notice; and is not rendered invalid for the reason that the property of the company is pledged without specification, or that the amount secured is not stated, or the time of redemption fixed.⁶ An instrument which recites that the maker of it had employed certain persons as counsel to prosecute a claim to certain land, and promises the payment of a certain sum "at the end of the litigation out of the land," is a mortgage.⁷ It indicates the creation of a lien, and specifies the debt intended to be secured and the property upon which it is to take effect. And so an agreement in a lease, that the lessor "is to have a lien" upon certain property for the faithful performance of the lessee's obligation to pay rent, is in effect a mortgage.⁸

¹ *Courtney v. Scott*, Litt. (Ky.) Sel. Cas. 457.

² *Gale v. Morris*, 29 N. J. Eq. 222.

³ See *Chase v. Peck*, 21 N. Y. 581.

⁴ *Gilson v. Gilson*, 2 Allen (Mass.), 115.

⁵ *De Leon v. Higuera*, 15 Cal. 483; and see *Barroilhet v. Battelle*, 7 Cal. 450.

⁶ *Mobile & C. P. R. R. Co. v. Talman*, 15 Ala. 472.

⁷ *Jackson v. Carswell*, 34 Ga. 279.

⁸ *Whiting v. Eichelberger*, 16 Iowa, 422.

A covenant by a debtor, to execute to his creditor a mortgage upon the debtor's share under his father's will, whenever a division shall have been made, was held to be a mortgage.¹ So was a provision in a deed that the grantee shall pay certain legacies which are a charge upon the property conveyed.² So also an agreement not under seal which provided that the purchase money of land if not sold by the purchaser should be secured by the property, and if sold, then paid from the proceeds.³

167. A written agreement that attempts to appropriate specific property to the payment of a debt, and gives the creditor possession of it to hold till the debtor shall make sale of the land and satisfy the debt from such sale, the occupation of the land and the doing of certain work to offset interest on the debt, constitutes an equitable mortgage binding upon the owner of the land, and upon any one who buys of him with notice of the agreement.⁴ An agreement on the back of a note, making it a charge upon particular land, is an equitable mortgage. In this way an agreement intended to operate as a revival of a mortgage note which had been paid may be rendered effectual, although ineffectual to revive the mortgage lien.⁵

An agreement by the equitable owner of land, that the holder of the legal title may hold it as security for the payment of a sum of money borrowed by the former of a third person, creates an equitable lien upon the land in favor of the lender.⁶

An agreement made by bondholders secured by a mortgage of a railroad that certain preference bonds secured by a subsequent mortgage should be a lien on the railroad prior to the bonds held by the several signers of the agreement operates as a pledge or equitable mortgage of the interest of such bondholders under the prior mortgage; but of course such agreement does not in any way affect the interest or the priority of the lien of any bondholders who do not sign the agreement.⁷

A mortgage made by a person individually to himself as guardian to secure moneys belonging to his ward would be regarded in a court of equity as a valid security against the guardian, and would be given effect for the purpose of protecting the interest

¹ *Lynch v. Utica Ins. Co.* 18 Wend. (N. Y.) 236. See, however, *Allen v. Montgomery*, 48 Miss. 101.

² *Stewart v. Hutchins*, 6 Hill (N. Y.), 143.

⁵ *Peckham v. Haddock*, 36 Ill. 38.

⁶ *Chadwick v. Clapp*, 69 Ill. 119.

³ *Racouillat v. Sansevain*, 32 Cal. 376.

⁷ *Poland v. Lamoille Valley R. R. Co.*

⁴ *Blackburn v. Tweedie*, 60 Mo. 505. 52 Vt. 144.

of the ward. After a sale of the mortgaged premises, a judgment in a foreclosure suit would estop the parties from questioning the mortgage, and a sale would confer a good title upon the purchaser.¹

168. Informal mortgages. — A mortgage, or trust deed, which cannot be enforced by a sale under the power or by a judgment of foreclosure, on account of some informality requisite to a complete mortgage or deed of trust, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by special proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage. Any agreement between the parties in interest that shows an intention to create a lien may be in equity a mortgage.² As stated by Judge Story,³ "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." Effect has been given in this way to a deed of trust in which the name of the trustee was accidentally omitted;⁴ to one from which a seal was omitted by mistake;⁵ to one sealed in fact, but not expressed to be sealed;⁶ to one imperfectly acknowledged, or not acknowledged at all;⁷ or not witnessed as a deed of real estate is required to be.⁸ But it seems that effect will not be given to a mortgage witnessed, acknowledged, and recorded, but not signed by the mortgagor.⁹

169. A mortgage defectively executed in the name of an agent, though purporting to be the mortgage of the corporation, is held to be binding in equity if it appear that the officer or agent had authority to bind it, and by accident or mistake executed it in his own name instead of the name of the company.¹⁰ In such a case, before the Supreme Court of California,¹¹ it was urged that the defective execution of the mortgage was caused by a mistake of law, and that therefore the defective execution could not be aided. In answer to this Mr. Justice Shaffter, delivering the

¹ *Lyon v. Lyon*, 67 N. Y. 250.

² *Daggett v. Rankin*, 31 Cal. 321.

³ *Flagg v. Mann*, 2 Sum. 486, 533.

⁴ *McQuie v. Peay*, 58 Mo. 56; *Burnside v. Wayman*, 49 Mo. 356.

⁵ *McClurg v. Phillips*, 49 Mo. 315; 57 Mo. 214; *Dunn v. Raley*, 58 Mo. 134; *Harrington v. Fortner*, 58 Mo. 468; *Gill v. Clark*, 54 Mo. 415.

⁶ *Jones v. Brewington*, 58 Mo. 210.

⁷ *Black v. Gregg*, 58 Mo. 565.

⁸ *Abbott v. Godfrey*, 1 Mich. 178; *Lake v. Doud*, 10 Ohio, 415.

⁹ *Goodman v. Randall*, 44 Conn. 321.

¹⁰ *Miller v. Rutland & Washington R. Co.* 36 Vt. 452. See § 127.

¹¹ *Love v. Sierra Nevada, L. W. & Mining Co.* 32 Cal. 639.

opinion of the court, replies, that where there is a defective execution of a power, it is a matter of no equitable moment whether the error came of a mistake of law or mistake of fact. It is enough that the power existed, and that there was an attempt to act under it. The relief is not so much by way of reforming the instrument as by aiding its defective execution; which aid is administered through or by the application of well settled maxims of the law; or, as in the class of cases to which this belongs, the instrument defectively executed as a deed is considered as properly executed as a contract for a deed; and therefore as requiring neither reformation nor aid, but as ripe for enforcement, according to the methods peculiar to courts of equity.

170. Mortgage by implied trust. — If a mortgage be made to two persons conditioned to secure the payment of a debt to one of them only, the legal estate would vest in them as tenants in common; but the one having no claim secured would be trustee to the extent of his moiety, and hold it in trust to secure the debt due the other.¹

In like manner where one advances money to pay off a mortgage, which is thereupon assigned for his protection to one of the owners of a part of the property, it is a trust in the hands of the latter, and may be established, as against all parties having notice of these facts, as an equitable lien, although the mortgage has been discharged of record.²

171. An assignment of rents and profits of land as security is an equitable mortgage. Such an assignment, in the words of Lord Thurlow, "is an odd way of conveying; but it amounts to an equitable lien, and would entitle the assignee to come into equity and insist upon a mortgage."³

A formal mortgage of a leasehold estate amounts only to an assignment of the rents and profits for the whole term, in states where foreclosure cannot be effected by a sale, but only by a strict foreclosure or a proceeding in that nature.⁴

A stipulation in a lease, that the building erected by the lessee "is mortgaged as security" for rent, is a good mortgage.⁵ An assignment of a lease absolutely, accompanied with a bond stating it to have been made to secure the payment of a debt, and

¹ Root v. Bancroft, 10 Met. (Mass.) 44. however, Alexander v. Berry, 54 Miss.

² King v. McVickar, 3 Sandf. (N. Y.) 422.

Ch. 192.

⁴ Hulett v. Soullard, 26 Vt. 295.

⁵ Willis, *ex parte*, 1 Ves. Jun. 162;

⁵ Barroilhet v. Battelle, 7 Cal. 450.

Abbott v. Stratten, 3 Jo. & Lat. 603. See,

providing for a reconveyance upon payment, is a mortgage,¹ in the same way that an absolute conveyance in fee accompanied by such a bond is a mortgage.

2. *By Assignments of Contracts of Purchase.*

172. An assignment by the vendee of a contract of purchase of land as security for a loan may be regarded as an equitable mortgage.² The rules applicable to a mortgage of real property govern it both as to the effect of it and the mode of enforcing it.³

Where one having a contract for the purchase of land agrees with another that he shall pay the purchase money and take a deed of the land for his security until repaid, the arrangement amounts to a mortgage of such equitable title.⁴ In like manner if the owner of land warrants secure a debt by having them entered in the name of his creditor, such entry is a mortgage.⁵

A mortgage made by one who holds only a bond or contract of purchase passes only the title he has in the premises at the time, subject to be enlarged by the mortgagor's acquiring afterwards the legal title. Such a mortgage amounts to a qualified assignment of the bond or contract. If the contract and mortgage be executed formally so that they may be recorded, the record is notice to any subsequent purchaser from the vendor of the mortgagee's right to purchase the property under the contract, if the vendee does not perform the condition of the mortgage.⁶ The vendor and vendee cannot rescind the contract as against such mortgagee after the vendor has actual notice of the mortgage. If a second mortgagee of such an equitable title be obliged for his own protection to pay the purchase money remaining due upon the bond, his lien for the money so advanced is superior to that of the first mortgagee of such equitable interest.⁷

173. A bond for a conveyance may be assigned by way of mortgage. If the assignee subsequently obtains the legal title to the land by virtue of the bond, and surrenders that, he will hold the land subject to the right of his assignor to redeem.⁸ Such a

¹ Jackson v. Green, 4 Johns. (N. Y.) 186.

² Fitzhugh v. Smith, 62 Ill. 486; Smith v. Lackor, 23 Minn. 454.

³ Brockway v. Wells, 1 Paige (N. Y.), 617.

⁴ Fessler's Appeal, 75 Pa. St. 483; Purdy v. Bullard, 41 Cal. 444.

⁵ Dwen v. Blake, 44 Ill. 135.

⁶ Alden v. Garver, 32 Ill. 32; Steinkemeyer v. Gillespie, 82 Ill. 253.

⁷ Steinkemeyer v. Gillespie, *supra*.

⁸ Baker v. Bishop Hill Colony, 45 Ill.

bond is itself sometimes declared to be in equity equivalent to a conveyance of the property, with a mortgage back; so that the assignment of it is equivalent to the assignment of a mortgage.¹

When land is sold on credit, and a bond is given to the purchaser to make title on payment of the purchase money, the effect of the contract is to create a mortgage, the same as if the vendor had conveyed the land by an absolute deed to the purchaser, and taken back a mortgage to secure the payment of the purchase money. The lien so created is an incumbrance on the land, not only against the purchaser and his heirs, but also against all subsequent purchasers.² It is said that bonds for title came into common use through the inability of the vendor, under the public land system of the United States, to make title at the time of the sale.

174. Although the contract of sale be conditional, it providing that the purchaser shall do certain things before he shall be entitled to the conveyance of the land, the purchaser has an interest before the performance of the things to be done on his part, which he may assign by way of security. By complying with all the conditions of the contract he acquires an equitable title, and when he has that, he may compel a conveyance of the legal title. He may also sell his interest, and by agreement reserve a lien upon the contract to secure his vendee's note for the purchase price, and upon the failure of his vendee, to pay as agreed, he may in an action upon the note, and to foreclose his lien upon the contract, have judgment upon the note, and a decree of sale of the interest under the contract to satisfy it. There is a sufficient interest in the land to support the action, although it does not amount to a title or estate.³

175. The assignment of a partial interest in a contract of purchase, as security for the payment of a debt, is an equitable mortgage; and the mortgagee may enforce his rights in equity against the assignor and those claiming under him with notice of

264; *Jones v. Lapham*, 15 Kans. 540; *Bull v. Sykes*, 7 Wis. 449; *Newhouse v. Hill*, 7 Blackf. (Ind.) 584; *Fenno v. Sayre*, 3 Ala. 458; *Alderson v. Ames*, 6 Md. 52; *Sinclair v. Armitage*, 12 N. J. Eq. 174; *Christy v. Dana*, 34 Cal. 548; *Neligh v. Michenor*, 3 Stockt. (N. J.) 539.

¹ *Jones v. Lapham*, 15 Kans. 540, per *Brewer J.*; *Button v. Schroyer*, 5 Wis. 598.

² *Lewis v. Boskins*, 27 Ark. 61; *Smith v. Robinson*, 13 Ark. 533; *Moore v. Anders*, 14 Ark. 628; *Shall v. Biscoe*, 18 Ark. 142; *Graham v. McCampbell*, Meigs, 52; *Tanner v. Hicks*, 4 S. & M. (Miss.) 294; *Pintard v. Goodloe*, Hemp. 502; *Thredgill v. Pintard*, 12 How. 24.

³ *Curtis v. Buckley*, 14 Kans. 449.

his rights. The holder of the legal title may be enjoined from making a transfer to any one else of the property covered by the assignment.¹

176. The assignment of a certificate of purchase of public lands issued by a state operates as an equitable mortgage, when intended to secure a debt due from the assignor to the assignee.² It may be enforced for the debt, and for money paid by the assignee, in order to prevent a forfeiture of the title.³ A clause in a mortgage of a land certificate, empowering the mortgagee to locate, enter upon, enjoy, and dispose of said land, as if acquired by a good and lawful title, only amplifies the security without rendering the conveyance absolute.⁴ The mortgage is of course subject to the payment of the amount due upon the certificate.⁵ If the purchaser pay this, the amount so paid becomes a prior lien upon the proceeds of a foreclosure sale of the land.⁶

A mortgage made by assigning a contract of purchase, or a land certificate, may be foreclosed by a bill in equity, in which a decree will be made for the sale of the right under the contract.⁷

An assignment of land certificates, such, for instance, as the school land certificates in some states, which are by their terms transferable by assignment and delivery, amounts to an equitable mortgage.⁸ In like manner certificates of stock in an unincorporated joint stock company, representing an interest in real estate, may be mortgaged in equity. The mortgage in such case is of course subject to the debts of the company, and to existing equities in favor of other stockholders.⁹

A settler upon public lands under the homestead act, after making proof of compliance with all the requirements of the law, so as to be entitled to a patent, may make a valid mortgage, although the patent has not been issued.¹⁰ But if he sell the land to another who obtains the title from the United States, the mortgagee will lose his title.¹¹

177. A preëmtor of public land cannot mortgage his in-

¹ Northup v. Cross, Seld. Notes (N. Y.), 111.

² Hill v. Eldred, 49 Cal. 398; and see Wright v. Shumway, 1 Biss. 23; Stover v. Bounds, 1 Ohio St. 107; Hays v. Hall, 4 Port. (Ala.) 374; Dodge v. Silverthorn, 12 Wis. 644; Case v. McCabe, 35 Mich. 100; Gunderman v. Gunnison, 39 Mich. 313.

³ Hill v. Eldred, *supra*.

⁴ Ross v. Mitchell, 28 Tex. 150.

⁵ Dodge v. Silverthorn, *supra*.

⁶ Dodge v. Silverthorn, *supra*.

⁷ Crumbaugh v. Smock, 1 Blackf. (Ind.) 305.

⁸ Mowry v. Wood, 12 Wis. 413; Jarvis v. Dutcher, 16 Wis. 307.

⁹ Durkee v. Stringham, 8 Wis. 1.

¹⁰ Jones v. Yoakam, 5 Neb. 265.

¹¹ Bull v. Shaw, 48 Cal. 455.

terest before entry. Before a valid mortgage can be made of a preëmption of public land an entry of it according to law must be made. The statutes of the United States provide that any grant or conveyance made before entry shall be void. Even where a mortgage is regarded as neither a grant nor a conveyance, and therefore not within the letter of the statute, it is construed to include a mortgage within its prohibition. The intention of the act was, that the title should be perfect and unincumbered, when it passes from the United States by the entry to the settler.¹

178. A mortgage may be constituted by act of legislature,² as where a railroad company accepted certain bonds issued under an act which declared that the bonds should "constitute a first lien and mortgage upon the road and property" of the company. The word property includes all the lands of the company, and any sale made by it is subject to the mortgage.³

To constitute a statutory lien it must clearly appear that it was intended that the statute should have this effect.⁴ Such a lien may be released by the authority that created it,⁵ or another person may be substituted by agreement of parties in place of the original lien holder.⁶

The bonds of a corporation, pledging its real and personal property for the payment of the debt, are treated in equity as a mortgage.⁷

3. *By Deposit of Title Deeds.*

179. An equitable mortgage may be created by deposit of the title deeds of a legal or an equitable estate as security for the payment of money.⁸ This method of creating a lien upon

¹ Sec. 13 of the Act of Congress, Sept. 4, 1841 (U. S. Stat. at Large, p. 456), provides that before an entry shall be allowed the claimant shall make oath that "he has not directly or indirectly made any agreement or contract, in any manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure in whole or in part to the benefit of any person except himself." And it also provides that "any grant or conveyance which he may have made, except in the hands of a *bonâ fide* purchaser for valuable consideration, shall be null and void." *Warren v. Van Brunt*, 19 Wall. 646; *Brewster v. Madden*, 15 Kans.

249; *Green v. Houston*, 22 Kans. 35; *McCue v. Smith*, 9 Minn. 252.

² See *Jones on Railroad Securities*, §§ 78-83.

³ *Wilson v. Boyce*, 92 U. S. 320; *Whitehead v. Vineyard*, 50 Mo. 30.

⁴ *Brunswick & Albany R. R. Co. v. Hughes*, 52 Ga. 557.

⁵ *Murdock v. Woodson*, 2 Dill. 188; *Woodson v. Murdock*, 22 Wall. 351.

⁶ *Ketchum v. Pacific Railroad*, 4 Dill. 78.

⁷ *White Water Valley Canal Co. v. Vallette*, 21 How. 414.

⁸ *Russel v. Russel*, 1 Bro. C. C. 269; *Pye v. Daubuz*, 2 Dick. 759; *Whitbread v. Jordan*, 1 Y. & C. 303; *Mandeville v.*

land is of much more frequent use in England than in this country. There, in the absence of a general system of recording, the possession of the title deeds of an estate is evidence of title. A transfer cannot be made without them. No one is supposed to have the right to retain them, unless he has a legal or equitable claim to the estate they represent. In all transfers of real estate the original deeds go with the property as evidences of title, and their examination by the solicitor of the parties is a prerequisite to every sale. Except in the counties of Middlesex and York, there are no registries where search can be made to ascertain the titles to lands, with the exception of copyhold titles, which are always to be found recorded in the manor courts. The only security which the purchaser has for the validity of his grantor's title is possession of the deeds which establish it.

In the United States, however, the reason for this doctrine does not exist. The registry system dispenses with the necessity of any production of title deeds, and supplies all the evidence to protect both vendor and vendee. It furnishes at once a true statement of the present condition of all legal rights to land, and if an original conveyance is ever lost or destroyed, a copy from the record is received as an equivalent.¹

180. The doctrine in England is well established, although it has been received with considerable disapprobation. "Now, since the case of *Russel v. Russel*," says Kindersley, V. C.,² "this is well settled: that supposing A., owing money to B., deposits the title deeds of his estate with B. for the purpose of a security, even without any writing, it is a good equitable mortgage; it gives B. a lien; and notwithstanding the expressions of regret of Lord Eldon that the law should be so, even in his time, we find him saying he could not disturb it; since that time it has been acted upon over and over again. That doctrine cannot now then be disturbed."

181. The legal effect of the deposit is, that the mortgagor contracts that his interest in the land shall be liable for the debt, and that he will make such a mortgage or conveyance as may be necessary to vest that interest in the mortgagee.³ It binds what-

Welch, 5 Wheat. 277; *Jarvis v. Dutcher*, 16 Wis. 307; *Carey v. Rawson*, 8 Mass. 159.

¹ *Probasco v. Johnson*, 2 Disney (Ohio), 96, 98.

² *Lacon v. Allen*, 3 Drew. 579, 582.

And see *National Bank of Australasia v. Cherry*, L. R. 3 P. C. C. 299; *Kensington, ex parte*, 2 V. & B. 79.

³ *Pryce v. Bury*, 2 Drew. 41, 42, per Kindersley, V. C.

ever interest he has in the whole property described in the title deeds. It does not imply that he will make perfect title to the property, but that he will give effect to the interest he has in it at the time, or may acquire afterwards during the deposit, by the discharge of an incumbrance upon it,¹ or the like. One holding title deeds as indemnity against contingent liabilities is not entitled to a formal mortgage before he has paid anything on account of such liability: but is entitled to a memorandum giving the terms of the deposit.²

The deposit may be made to cover subsequent advances by a subsequent parol agreement to that effect between the parties, without a return of the deeds and a new deposit of them.³

In this respect an equitable mortgage is a broader security than a legal one; for a legal mortgage cannot be enlarged in its effect by a subsequent parol agreement that it shall secure further advances; but although the mortgagee holds the title deeds, he is not entitled to say that he holds them as a deposit,⁴ unless the parties make an express agreement that they shall be so held.⁵

182. It is not necessary that every deed relating to the property should be deposited;⁶ nor it is necessary that they should show a title in the mortgagor by including the deed by which he acquired title.⁷ A deposit of the title deed, omitting the latter deed has priority over a subsequent deposit of the latter deed alone.⁸

183. A deposit for the purpose of preparing a legal mort-

¹ *Ex parte Bisdee, re Baker*, 1 M., D. & De G. 333.

² *Sporle v. Whayman*, 20 Beav. 607.

³ *Ex parte Langston*, 17 Ves. 227; *Baynard v. Woolley*, 20 Beav. 586; *Ex parte Kensington*, 2 V. & B. 79, 83.

In the latter case Lord Eldon said: "In the cases alluded to I went the length of stating, that, where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be too thin, that you should not have the benefit of such an agreement unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, and a redelivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien, within the principle of these cases."

⁴ *Ex parte Hooper, re Hewett*, 1 Mer. 7.

⁵ *Re Henry, ex parte Crossfield*, 3 Ir. Eq. 67.

⁶ *Ex parte Wetherell*, 11 Ves. 398, 401; *Lacon v. Allen*, 3 Drew. 582. In the latter case, Kindersley, V. C., said: "The question is, is it necessary that every title deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In each case we must judge whether the instruments deposited are material parts of the title; and if they are, it is not necessary to say there are other deeds material, if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage."

⁷ *Roberts v. Croft*, 24 Beav. 223; *aff. 2 De G. & J. 1.*

⁸ *Roberts v. Croft, supra.*

gage creates an equitable mortgage.¹ "The principle of an equitable mortgage is," said Lord Eldon,² "that the deposit of the deeds is evidence of the agreement; but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?" Where no written contract or memorandum accompanies the deposit, the presumption that a mortgage was intended, arising from the possession of the deeds, may be rebutted by parol evidence of the circumstances under which the deeds were left, and of the intention of the parties in the matter.³ Of course a statement in writing of the purpose for which the deposit was made cannot be contradicted.⁴

184. The law of the place of contract governs. When a citizen of a foreign country, by the law of which a lien cannot be created in this way, being in England, there makes a deposit of title deeds as security, his contract is governed by the law of England.⁵

185. In America the doctrine of a mortgage by deposit of title deeds has been adopted only to a very limited extent. Generally something more is required than a mere verbal agreement or understanding that the creditor is to hold them as security or indemnity. To create a lien upon land in this way would be, it is declared, to repeal judicially the statutes of frauds and perjuries, making void sales not evidenced by writing. The doctrine, moreover, is not compatible with the registry system.

The attempts to apply the doctrine have not been very numerous, it being generally understood that it has no application here. The doctrine, therefore, may be considered as generally rejected, so far as it sustains a mortgage upon a verbal or implied promise in connection with the deposit of the deeds.⁶

186. Yet in several cases mortgages created in this way

¹ *Ex parte Hooper*, 1 Mer. 7; 19 Ves. 477; *Hockley v. Bantock*, 1 Russ. 141.

² *Ex parte Bruce*, 1 Rose, 374; and see *Ex parte Wright*, 19 Ves. 255, 258.

³ *Ex parte Langston*, 17 Ves. 227; *Lucas v. Dorrien*, 1 Moo. 29; 7 Taunt. 278.

⁴ *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

⁵ *Ex parte Holthausen, re Scheibler*, L. R. 9. Ch. App. 722. See *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo.

Ind. App. 303. See, also, *Ex parte Polard, in re Courtney*, Mon. & C. 239.

⁶ *Shitz v. Dieffenbach*, 3 Pa. St. 233; *Meador v. Meador*, 3 Heisk. (Tenn.) 562; *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435, 438; *Gothard v. Flynn*, 25 Miss. 58. The question was previously raised in *Williams v. Stratton*, 10 Sm. & M. 418. See cases in favor of the doctrine, §§ 179, 186.

have been sustained.¹ The deposit of a deed, conveying the legal title to an estate as security for the amount of a mortgage released by the person receiving the deposit, was held to constitute an equitable mortgage, as between the original parties and those subject to their equities.² A court of equity in such case will not compel the holder of the deeds to deliver them up until he has received payment of the debt for which they were pledged.³ On the contrary, it will establish the lien and enforce a sale of the depositor's interest, and the interest of those subject to this equity.⁴ A suit in equity is the proper means to establish the lien, and the decree should be for a sale, if the debt be not paid by a given day.⁵

187. A written memorandum makes the deposit a mortgage. Even where a deposit of title deeds upon a verbal agreement, that they shall be held as security for a debt, does not constitute an equitable mortgage, a written agreement to the same effect accompanying the deeds will make the transaction a mortgage.⁶ As already noticed, such written agreement alone without the deposit of title deeds is regarded as an equitable mortgage.

188. The remedy under an equitable mortgage created by a deposit of title deeds or other equitable transfer, to cut off the equity of redemption, is by a suit in equity.⁷ When, however, a mortgage is created by a conveyance of an equitable estate legal in form, it may be foreclosed in the ordinary way.

When a mortgage is effected by an assignment of an executory contract of purchase, a foreclosure and sale operate only to transfer the debt to the purchaser, who becomes in equity the assignee of the mortgagor's contract, and entitled to the full benefit of it without redemption. Such a mortgage is ineffectual to transfer the legal title, although the mortgagor may have subsequently acquired that. It can only be enforced as an equitable lien.⁸

¹ *Gale v. Morris*, 29 N. J. Eq. 222; *Griffin v. Griffin*, 18 N. J. Eq. 104.

² *Hackett v. Reynolds*, 4 R. I. 512; *Rockwell v. Hobby*, 2 Sandf. (N. Y.) Ch. 9.

³ See *Griffin v. Griffin*, *supra*, decided with reference to New York law.

⁴ *Hackett v. Reynolds*, *supra*.

⁵ *Jarvis v. Dutcher*, 16 Wis. 307.

⁶ *Lueh's Appeal*, 44 Pa. St. 519; *Edwards v. Trumbull*, 50 Pa. St. 509.

⁷ *Mowry v. Wood*, 12 Wis. 413; *Jarvis v. Dutcher*, 16 Wis. 307; *Case v. McCabe*, 35 Mich. 100.

⁸ *Stewart v. Hutchinson*, 29 How. (N. Y.) Fr. 181.

CHAPTER VI.

LIENS FOR PURCHASE MONEY.

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PART I.

THE VENDOR'S IMPLIED LIEN.

1. *Nature and Extent of the Lien.*

189. Nature of the lien. — It is a doctrine of the English courts of chancery that a vendor has a lien upon the land sold by him for the purchase money, as against the vendee and his heirs, although he has taken no distinct agreement or separate security for it. There is a natural equity, it is said, that the land shall stand charged with so much of the purchase money as is not paid at the time of the conveyance.¹ It is also said that the principle of it originates in trust.² "Upon principle," says Lord Eldon, "without authority, I cannot doubt that it goes upon this,

¹ *Chapman v. Tanner*, 1 Vern. 267, per the Lord Keeper; *Hiscock v. Norton*, 42 Mich. 320; *Warren v. Fenn*, 28 Barb. (N. Y.) 334, per Potter, J.: "It has become one of the best established principles of natural equity, — that estates are to be regarded as unconscientiously obtained when the consideration is not paid."

² *Blackburn v. Gregson*, 1 Bro. Ch. 420, per Lord Loughborough: "Lord Bathurst doubted whether there was such an equitable lien. *Fawell v. Heelis*, Amb.

724. It becomes, therefore, of great consequence that it should be spoken to. It struck me always that there was such a lien, and that it was so from the foundation of the court. A bargain and sale must be for money paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; then, if part be paid, is it not the same as to that which is unpaid?"

that a person having got the estate of another shall not, as between them, keep it, and not pay the consideration."¹

The only other ground upon which it has been suggested that the doctrine rests is the supposed intention of the parties; and on this point Chief Justice Gibson remarks:² "The implication that there is an intention to reserve a lien for the purchase money in all cases where the parties do not, by express acts, evince a contrary intention, is in almost every case inconsistent with the truth of the facts, and in all instances, without exception, in contradiction of the express terms of the contract, which purports to be a conveyance of everything that can pass."

190. As to the grounds of the doctrine, Chief Justice Gray,³ in a careful review of the subject, says: "The theory that a trust arises out of the unconscientiousness of the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*." As to the natural equity of the lien the learned Chief Justice quotes with approval the argument of counsel in an English case,⁴

¹ Mackreth v. Symmons, 15 Ves. 329. As to the time when this doctrine was established, Lord Eldon said: "I take that to have been the settled doctrine at the time of the decision of Blackburne v. Gregson; which case so far shook the authority of Fawell v. Heelis as to relieve me from any apprehensions that Lord Bathurst's doctrine can be considered as affording the rule, to be applied between the vendor and vendee themselves, and persons claiming under them." And see 1 White & Tudor's Lead. Cas. in Eq. 89.

² Kauffelt v. Bower, 7 S. & R. (Pa.) 64, 76.

³ Ahrend v. Odiorne, 118 Mass. 261. Chief Justice Gray, after examining the sources from which it has been supposed the doctrine of this lien is derived, says: "The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid pur-

chase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases, or to a limited extent, taken in execution for debt." In conclusion he decides against adopting in Massachusetts "a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties."

⁴ In Blackburne v. Gregson, 1 Cox Ch. 90, 100; 1 Bro. Ch. 420.

Under the civil law, to which the origin of the vendor's lien is referred, the purchase price of personal property was se-

not answered by the court: "It is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

The objection, that the establishment of this lien is in contravention of the policy of the statute of frauds, is met by the reply that the lien is really a constructive trust, and that the statute is admitted to have no application to a trust arising in this manner.¹ "It is not, perhaps," says Judge Story, "so strong a case as that of a mortgage implied by a deposit of the title deeds of the real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained."²

191. How far adopted in this country. — The doctrine of a vendor's lien for the purchase money prevails in upwards of half in number of the states,³ and in the other states the doctrine has

cured in the same way; but neither in England nor America has the rule been extended to personalty.

¹ Warren v. Fenn, 28 Barb. (N. Y.) 333; Wood v. Lester, 29 Ib. 145, 152; Mims v. Macon & W. R. R. Co. 3 Kelly (Ga.), 333, 341; and see Womble v. Battle, 3 Ired. Eq. (N. C.) 182, per Nash, J.

² 2 Story's Eq. Jur. § 1218; and see § 1221.

³ The doctrine prevails in: —

Alabama: Gordon v. Bell, 50 Ala. 213; White v. Stover, 10 Ala. 441; Bradford v. Harper, 25 Ala. 337; also applied to exchanges: Burns v. Taylor, 23 Ala. 255; Wood v. Sullens, 44 Ala. 686. **Arkansas:** Shall v. Biscoe, 18 Ark. 142; Campbell v. Rankin, 28 Ark. 401; Turner v. Horner, 29 Ark. 440; Lavender v. Abbott, 30 Ark. 172; Refeld v. Ferrell, 27 Ark. 534. But a recent act of the legislature declares that no lien shall be allowed when the same is not reserved. Harris v. Hanks, 25 Ark. 510-517. **California:** Salmon v. Hoffman, 2 Cal. 138; Sparks v. Hess, 15 Cal. 186; Burt v. Wilson, 28 Cal. 632; Gallagher v. Mars, 50 Cal. 23. It is also provided by statute that one who sells real estate shall have a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. Civil Code, 1872,

§ 3046. **Colorado:** Francis v. Wells, 2 Col. 660. **Distriet of Columbia:** Ford v. Smith, 1 McAr. 592. **Florida:** Bradford v. Marvin, 2 Fla. 463; Wooten v. Bellinger, 17 Fla. 289, 300. **Illinois:** Moshier v. Meek, 80 Ill. 79; Keith v. Horner, 32 Ill. 524; Boynton v. Champlin, 42 Ill. 57; Dyer v. Martin, 4 Scam. 146; Wing v. Goodman, 75 Ill. 159; Kirkham v. Boston, 67 Ill. 599; Wilson v. Lyon, 51 Ill. 166. **Indiana:** Yaryan v. Shriner, 26 Ind. 364; Mattix v. Weand, 19 Ind. 151; Deibler v. Barwick, 4 Blackf. 339. **Iowa:** Grapengether v. Fejervary, 9 Iowa, 163; McDole v. Purdy, 23 Iowa, 277; Johnson v. McGrew, 42 Iowa, 555; Jordan v. Wimer, 45 Iowa, 65. But criticised in Pierson v. David, 1 Iowa, 23; Porter v. City of Dubuque, 20 Iowa, 440. Now must be reserved in deed to avail against grantee's conveyance. R. S. 1873, § 1940. This statute does not apply to sales made before its enactment. Jordan v. Wimer, *supra*. **Kentucky:** Thornton v. Knox, 6 B. Mon. 74; Ledford v. Smith, 6 Bush, 129; Tiernan v. Thurman, 14 B. Mon. 277; Emison v. Risque, 9 Bush, 24. But it is now provided by statute that the grantor shall not have a lien against *bond fide* purchasers and creditors unless he states in his deed what part of the consideration remains unpaid. G. S. 1873, p. 589; Ross v. Adams, 13 Bush (Ky.), 370.

either been rejected from the beginning, or, having prevailed at one time, has since been expelled by statute, although it may be that in a few states the question of its existence has not been definitely decided. In the courts of the United States the doctrine has never been affirmed, except where established by the local law of the different states.¹ The doctrine, even in those states that have adopted it, has frequently been criticised and deplored, as inconsistent with the general policy prevailing in this country to make all matters of title depend upon record evidence.²

The doctrine is no more satisfactory now than it was in Lord Eldon's time; in fact, it is much less so. From the nature of the equity, there could be but few fixed rules regarding it; but it will be observed in following the American decisions, which are numerous, that there is hardly a rule upon the subject that has not been somewhere denied; that hardly any two states can be found in which the courts agree upon all the important points of the doctrine; and that the cases are not rare in which the decisions in the same state are irreconcilable.³ The remark of Lord Mans-

Maryland: Carr v. Hobbs, 11 Md. 285.

Michigan: Payne v. Avery, 21 Mich. 524;

Carroll v. Van Rensselaer, Harr. (Mich.)

225. **Minnesota:** Duke v. Balme, 16

Minn. 306; Selby v. Stanley, 4 Minn. 65.

Mississippi: Dodge v. Evans, 43 Miss.

570; Pitts v. Parker, 44 Miss. 247. It has

been applied to a sale of a leasehold es-

tate. Richardson v. Bowman, 40 Miss.

782. **Missouri:** Delassus v. Poston, 19

Mo. 425; Marsh v. Turner, 4 Mo. 253;

Pratt v. Clark, 57 Mo. 189. **New Jersey:**

Herbert v. Scofield, 1 Stock. Ch. 492;

Corlies v. Howland, 26 N. J. Eq. 311;

Dudley v. Dickson, 14 Ib. 252. **New**

York: Smith v. Smith, 9 Abb. Pr. (N. S.)

420; Stafford v. Van Rensselaer, 9 Cow.

316; Chase v. Peck, 21 N. Y. 581. **Ohio:**

Williams v. Roberts, 5 Ohio, 35; Brush

v. Kinsley, 14 Ohio, 20; Anketal v. Con-

verse, 17 Ohio St. 11. **Oregon:** Pease v.

Kelly, 3 Oreg. 417; Coos Bay Wagon Co.

v. Crocker (C. C. Oregon, 1880), 4 Fed.

Rep. 577. **Rhode Island:** Kent v. Ger-

hard, 12 R. I. 92. **Tennessee:** Ross v.

Whitson, 6 Yerg. 50. **Texas:** Pinchain

a. Collard, 13 Tex. 333; White v. Downs,

40 Tex. 225; Yarbrough v. Wood, 42

Tex. 91; Brown v. Christie, 35 Tex. 689;

Flanagan v. Cushman, 48 Tex. 241. **Wis-**

consin: Willard v. Reas, 26 Wis. 540.

¹ Bayley v. Greenleaf, 7 Wheat. 46;

M'Learn v. M'Lellan, 10 Pet. 625, 640;

Chilton v. Braiden, 2 Black, 458.

² See Chief Justice Marshall's remarks

in Bayley v. Greenleaf, 7 Wheat. 46, 51;

per Treat, J., in Conover v. Warren, 1

Gilm. (Ill.) 498, 502; Yancey v. Mauck,

15 Gratt. (Va.) 300. And it was fre-

quently condemned in the courts of Vir-

ginia before it was abolished by statute.

McCandlish v. Keen, 13 Gratt. 615, 621.

³ It is to be noticed that, within a few

years, several states have abolished this

implied lien, and that strong expressions

of disapprobation of the doctrine have

been used in others. Moreover, the prac-

tical tendency in the older states is to rely

upon formal instruments for security when

security is wanted. It may be doubted,

therefore, whether this doctrine will long

survive.

The doctrine is rejected or not adopted

in the following states:—

Connecticut: Not adopted, and may be

considered in doubt. Atwood v. Vincent,

17 Conn. 575; Chapman v. Beardsley, 31

Conn. 115; Meigs v. Dimock, 6 Conn.

field, that "the more we read, the more we shall be confounded," is not without its application here.

This is eminently a subject of case law. To a large degree each case is a law unto itself and unto no other case.

The inquiry in every case is, whether there are other equities superior to this lien, or whether it has been waived by any act of the party claiming it. "Its existence," says Mr. Justice Potter,¹ "depends upon and is controlled by no well settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person; whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity; or whether by the acts or omissions to act, or by the neglect of the party claiming such lien to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands."

192. The lien is presumed to exist in all cases unless an intention be clearly manifest that it shall not exist.² The vendee

458, 464; *Watson v. Wells*, 5 Conn. 468. In the case first cited Church, J., said: "In this state, we have not yet had occasion to resort to it." **Georgia**: Now abolished by statute, although it formerly existed. Code, 1873, § 1997; *Jones v. Janes*, 56 Ga. 325. **Kansas**: Denied. *Simpson v. Mundee*, 3 Kans. 172; *Brown v. Simpson*, 4 Ib. 76; *Smith v. Rowland*, 13 Ib. 245; *Greeno v. Barnard*, 18 Kans. 518. **Maine**: Considered and rejected in *Gilman v. Brown*, 1 Mason, 191, 219; *Philbrook v. Delano*, 29 Me. 410, 415. **Massachusetts**: Denied. *Gilman v. Brown*, *supra*; repudiated in *Ahrend v. Odiorne*, 118 Mass. 261. **Nebraska**: Rejected as contrary to policy of the law. *Edminster v. Higgins*, 6 Neb. 265. **New Hampshire**: Its existence questioned in *Arlin v. Brown*, 44 N. H. 102. **North Carolina**: Denied. *Womble v. Battle*, 3 Ired. Eq. 182; *Henderson v. Burton*, Ib. 259; *Cameron v. Mason*, 7 Ib. 180; though it had been adopted in earlier cases. **Pennsylvania**: Denied. *Kauffelt v. Bower*, 7 S. & R. 64; *Hepburn v. Snyder*, 3 Pa. St. 72; *Ste-*

phen's Appeal, 38 Ib. 9; *Hiester v. Green*, 48 Ib. 96. **South Carolina**: Denied. *Wragg v. Comp. Gen.* 2 Desau. 509, 520. **Vermont**: Judicially adopted in *Manly v. Slason*, 21 Vt. 271, but immediately abolished by legislature. St. of 1851, c. 47; G. S. 1862, c. 65, § 33. **Virginia**: Though it formerly existed, it is now abolished unless it be expressly reserved on the face of the conveyance. C. 1873, c. 115, § 1. **West Virginia**: Abolished, unless it be expressly reserved on the face of the conveyance. C. 1870, c. 75, § 1; Acts 1873, c. 139; *Warren v. Branch*, 15 W. Va. 21.

¹ *Fisk v. Potter*, 2 Abb. (N. Y.) App. Dec. 138; 2 *Keyes* (N. Y.), 64.

² Per Lord Eldon, in the leading case before cited; *Gilman v. Brown*, 1 Mason, 191, 213; *Garson v. Green*, 1 Johns. (N. Y.) Ch. 308; *Allen v. Bennett*, 8 Sm. & M. (Miss.) 672, 681; *Truebody v. Jacobson*, 2 Cal. 269; *Schnebley v. Ragan*, 7 Gill & J. (Md.) 120; *Clark v. Hall*, 7 Paige (N. Y.), 382; *Wilson v. Lyon*, 51 Ill. 166; *Dodge v. Evans*, 43 Miss. 570; *Fry v. Prewett*, 56 Miss. 783.

has the burden of repelling the presumption of a lien. It being a matter of intention, its existence depends upon the circumstances of each case. "What shall be sufficient to make a case in which the lien can be said not to exist," is always the inquiry to be made; and for this reason, so inconvenient and unsatisfactory is the doctrine that Lord Eldon said: ¹ "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly, that a purchaser might be able to know, without the judgment of a court, in what cases it would and in what cases it would not exist."

193. *Extent of the lien.* — The lien exists to the extent of the purchase money against the vendee and his heirs; against his privies in estate, and against subsequent purchasers who have notice of it; against those who take a conveyance of the estate without advancing any new consideration, so that they are not, within the meaning of the rule of equity, purchasers for value; and against voluntary assignees also who are not *bond fide* purchasers. The lien is necessarily confined to the particular tract of land for the purchase of which the debt arose.²

It covers interest on the purchase money;³ but it does not give the vendor any claim to the profits of the land.⁴ If the vendor has been in receipt of the rents under an agreement that he should collect and apply them to the debt, his right to them will cease upon the vendee's bankruptcy.⁵

The lien cannot be extended to any other indebtedness of the vendee arising from other transactions.⁶ When a note is given in part for purchase money and in part for other consideration, it may be enforced as a lien for the part representing the unpaid price of the land, if it can be shown precisely what part of it was for that consideration.⁷

The lien does not arise in favor of one who advances money to the vendee at his request for the payment of part of the purchase money due the vendor.⁸

¹ In the leading case before cited.

² *Fietsam v. Kropp*, 6 Bradw. (Ill.) 144.

³ *Succession of Richardson*, 10 La. Ann. 616. But not a subsequent note given for unpaid interest. *Fietsam v. Kropp*, *supra*.

⁴ *Little v. Brown*, 2 Leigh (Va.), 353; *Hall v. Scovel*, 10 N. Bank. R. 295.

⁵ *Hall v. Scovel*, *supra*.

⁶ *Refeld v. Ferrell*, 30 Ark. 465.

⁷ *Swain v. Cato*, 34 Tex. 395; *Russell v. McCormick*, 45 Ala. 587; and see *Harris v. Hanks*, 25 Ark. 510.

⁸ *Chapman v. Abrahams*, 61 Ala. 108.

The lien arises in favor of a tenant in common upon his sale of his undivided interest in lands to his cotenants.¹ It exists for the amount of money allowed as owelty in partition. It becomes a valid charge upon the purpart, on account of which it is granted, so soon as the partition is made final by the decree.²

It has been held that this lien may arise upon the sale of a mere equitable interest.³

The vendor of a leasehold interest in real estate has an implied lien to secure the payment of the purchase money,⁴ because the leasehold interest is personal property.

It is held to apply to sales made under process of law as well as to voluntary sales.⁵

The lien is sustained against the vendee's heirs, because if it was against conscience that he himself should have the land without paying for it, it is equally against conscience that his heirs should be allowed to hold it.⁶

A married woman's separate real estate can be affected or charged by a vendor's lien.⁷

The widow's right to dower in the estate is subject to the lien.⁸

The right of homestead is also subject to the lien.⁹

194. For unliquidated claim. — The lien does not exist as a security for an unliquidated and uncertain demand;¹⁰ as, for in-

¹ *Norman v. Harrington*, 62 Ala. 107.
² *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99.

³ *Warren v. Fenn*, 28 Barb. (N. Y.) 333. *Logwood v. Robertson*, 62 Ala. 523.

⁴ *Richardson v. Bowman*, 40 Miss. 782; *Choate v. Tighe*, 10 Heisk. (Tenn.) 621; *Bratt v. Bratt*, 21 Md. 578. *Contra*, *Cade v. Brownlee*, 15 Ind. 369.

⁵ *Mims v. Macon & W. R. R. Co.* 3 Ga. 533, 342; *Buford v. McCormick*, 57 Ala. 428.

⁶ *Bayley v. Greenleaf*, 7 Wheat. 46; *Cole v. Scot*, 2 Wash. (Va.) 141; *Shirley v. Sugar Refinery*, 2 Edw. (N. Y.) 505; *Warner v. Van Alstyne*, 3 Paige (N. Y.), 513.

In California, by statute, the lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith. Civil Code, § 2048.

⁷ § 116; *Weinberg v. Rempe*, 15 W. Va. 829, 831; *Jackson v. Rutledge*, 3

Lea (Tenn.), 626; *Kent v. Gerhard*, 12 R. I. 92.

⁸ *Fisher v. Johnson*, 5 Ind. 492; *Boyd v. Martin*, 9 Heisk. (Tenn.) 382.

⁹ *McHendry v. Reilly*, 13 Cal. 75.

¹⁰ *Payne v. Avery*, 21 Mich. 524; *Hiscock v. Norton*, 42 Mich. 320; *Patterson v. Edwards*, 29 Miss. 67; *Sears v. Smith*, 2 Mich. 243; *Vandoren v. Todd*, 2 Green (N. J.) Ch. 397. *Contra*, *Jordan v. Wimer*, 45 Iowa, 65.

In an Iowa case the lien was allowed and enforced in an exchange of lands, for a deficiency in the value of the lands taken in exchange, on account of the fraudulent representations of the other party; *McDole v. Purdy*, 23 Iowa, 277; and in a case before the Supreme Court of New York, land having been sold to a corporation to be paid for in its stock, upon failure to deliver the stock the lien was established. *Dubois v. Hull*, 43 Barb. 26.

stance, an obligation to support the vendor for life,¹ or to assume and pay the debt of another.² It may be said, too, that when the sale is not made for a sum of money, but in consideration of a covenant or agreement to do certain things, the covenant or agreement is then itself the consideration, and in obtaining the covenant or agreement the vendor has been paid all he contracted for.³ And so if other property be taken in exchange, the title of which is covenanted by the vendee, it is considered that the vendor has evinced an intention to rely upon that remedy, and has waived his lien.⁴ A note payable in certificates of indebtedness is secured by the lien the same as if it were payable in money.⁵

195. This lien does not spring from any agreement of the parties, and is wholly independent of any such agreement. Moreover, the fact that there is a verbal agreement of the parties that the vendee shall reconvey the land if he does not pay the purchase price, does not prevent the enforcement of the lien ; for such an agreement is void under the statute of frauds.⁶

196. It may be shown by parol evidence, that the bond or note was accepted in full discharge of the price of the land. "It is the vendor," says Sir John Leach,⁷ "who in the first place attempts to raise an equity against the allegation of the deed ; and if the vendor be permitted to repel the effect of the deed by showing that the price was not paid, it must necessarily follow that the vendee must be at liberty to disclose the whole truth, and to explain the reason why that payment was not made." Parol evidence in such case does not vary or contradict any writing, as the lien does not exist by writing, and no writing is required to release it. Any act or declaration of the vendor which shows that he does not rely upon his lien now, or that he never relied upon it, or that he has abandoned the lien, will prevent its being established. Thus, where a father had conveyed land to his son, taking his notes for the price, and afterwards declared that he did not intend to collect the notes, it was held

¹ *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh (Va.), 522; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Chase v. Peck*, 21 N. Y. 581.

² *Chapman v. Beardsley*, 31 Conn. 115.

³ *Buckland v. Pocknell*, 13 Sim. 406; *Dixon v. Gayfere*, 17 Beav. 421; 21 Ib. 118.

⁴ *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92; *Coit v. Fougere*, 36 Ib. 195.

⁵ *Denson v. Taylor*, 53 Miss. 697.

⁶ *Gallagher v. Mars*, 50 Cal. 23.

⁷ In *Winter v. Lord Anson*, 1 S. & S. 434; and see *Perry v. Grant*, 10 R. I. 334; *Doolittle v. Jenkins*, 55 Ill. 400; *Kirkham v. Boston*, 67 Ill. 599.

that such declaration clearly showed he did not intend to rely upon the lien, or to enforce it, and, consequently, his representatives after his decease were not allowed to enforce it.¹

197. The lien is not waived by any acknowledgment of the receipt of the consideration, whether that be contained in the body of the deed, or on the back of it, or in a separate instrument.² One purchasing from the vendee, finding a recital of payment of the consideration in the deed, may well infer that it has in fact been paid; but if he knows to the contrary the acknowledgment does not protect him. Evidence that it was not paid may be given, and then notice of this fact to the purchaser may be brought home to him.³

2. *How defeated and waived.*

198. The lien is not waived by taking a note or bond or other personal obligation of the purchaser alone, for the amount of the unpaid purchase money.⁴ The taking of such written evidence of the debt does not by itself show an intention to rely exclusively upon the purchaser's credit. Nor does the fact, that the time of payment is by such obligation postponed, affect the lien; even if postponed during the lifetime of the vendor.⁵ But when it appears that the bond or note is all that the vendor intended to receive for the conveyance made by him, and that such personal security was substituted for the purchase money, there is no lien.⁶ The fact that the note or bond is received expressly in

¹ Moshier v. Meek, 80 Ill. 79.

² Mackreth v. Symmons, 15 Ves. 329; Cuney v. Bell, 34 Tex. 177; Gilman v. Brown, 1 Mason, 191, 214; Scott v. Orbi-son, 21 Ark. 202; Holman v. Patterson, 29 Ark. 357; Sheratz v. Nicodemus, 7 Yerg. (Tenn.) 9; Tribble v. Oldham, 5 J. J. Marsh. (Ky.) 137, 144.

³ Gordon v. Manning, 44 Miss. 756.

⁴ Mackreth v. Symmons, 15 Ves. 329; Manly v. Slason, 21 Vt. 271; White v. Williams, 1 Paige (N. Y.), 502; Garson v. Green, 1 Johns. (N. Y.) Ch. 308; Corlies v. Howland, 26 N. J. Eq. 311; Warren v. Penn, 28 Barb. (N. Y.) 333; Brinkerhoff v. Vansciven, 3 Green (N. J.) Ch. 251; Evans v. Goodlet, 1 Blackf. (Ind.) 246; Aldridge v. Dunn, 7 Ib. 249; Denny v. Steakly, 2 Heisk. (Tenn.) 156; Taylor v. Hunter, 5 Humph. (Tenn.) 569; Clark

v. Hunt, 3 J. J. Marsh. (Ky.) 553, 558; Thornton v. Knox, 6 B. Mon. (Ky.) 74; Honore v. Bakewell, Ib. 67; Christian v. Austin, 36 Tex. 540; Pinchain v. Col-lard, 13 Tex. 333; Bradford v. Harper, 25 Ala. 337; Plowman v. Riddle, 14 Ala. 169; Baum v. Grigsby, 21 Cal. 172; Andrews v. Scotton, 2 Bland (Md.), 629.

The rule applies equally to a check or draft; Honore v. Bakewell, 6 B. Mon. (Ky.) 67; Madden v. Barnes, 45 Wis. 135; S. C. 7 Reporter, 64; or certificate of deposit. Mims v. Macon & W. R. R. Co. 3 Ga. 333.

⁵ Winter v. Lord Anson, 3 Russ. 488, reversing S. C. 1 S. & S. 434; Redford v. Gibson, 12 Leigh (Va.), 332, 347.

⁶ Dixon v. Gayfere, 17 Beav. 421; 21 Ib. 118; Keith v. Wolf, 5 Bush (Ky.), 646.

consideration of the conveyance, and in full satisfaction for it, may appear by the deed of conveyance,¹ or by a separate writing,² or from the circumstances of the case.³

The intention to waive the lien, when only the personal obligation of the vendee is taken for the purchase money, may be shown by an express agreement of the parties, or by any expressions inconsistent with an intention to continue it.⁴

A lien upon land conveyed to a married woman, and partly paid for by her out of her own funds, has been regarded as waived by taking the husband's note for the balance.⁵

199. The lien is defeated by a conveyance by the vendee to one who purchases in good faith, without notice of the lien.⁶ It is a secret, invisible lien, known only to the parties, and to those to whom they may have communicated the fact of its existence.

¹ *Clarke v. Royle*, 3 Sim. 499; *Buckland v. Pocknell*, 13 Sim. 406.

² *Dixon v. Gayfere*, 17 Beav. 421; 21 Ib. 118.

³ *Earl of Jersey v. Briton Ferry Floating Dock Co. L. R.* 7 Eq. 409.

⁴ *Winter v. Lord Anson*, 1 S. & S. 434, 445; *Ex parte Parkes*, 1 G. & J. 228.

In Iowa it is provided by statute that no vendor's lien for unpaid purchase money shall be recognized or enforced in any court of law or equity, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instruments duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executors, or assigns to enforce such lien. Sect. 1940, Rev. of 1873. *Rotch v. Hussey*, 52 Iowa, 694. But it is held that a mortgage is not such a conveyance as will deprive a vendor of a lien for purchase money; but the lien attaches to the vendee's equity of redemption. *Tinsley v. Tinsley*, 52 Iowa, 14.

In Kentucky it is provided that when any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same, against *bona fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid. Gen. Stat. of Ky. 1873, p. 589, § 24. As to what is a sufficient reservation, under this provision, see

Keith v. Wolf, 5 Bush 646; *Ledford v. Smith*, 6 Ib. 129. When, by mistake, reservation was not made. *Phillips v. Skinner*, 6 Bush 662. Notice to the purchaser in any other way, that the purchase money is not paid, will not affect him. *Chapman v. Stockwell*, 18 B. Mon. 650. The amount must be expressly stated. *Taylor v. Ford*, 1 Bush, 44; *Maupin v. McCormick*, 2 Bush, 206; *Gritton v. McDonald*, 3 Met. 252; *Cottman v. Martin*, 1 Ib. 563. A covenant to pay all the vendor's debts, the amount of which is not stated, is not a sufficient reservation. *Long v. Burke*, 2 Bush, 90.

⁵ *Cowl v. Varnum*, 37 Ill. 181; *Andrus v. Coleman*, 82 Ill. 26.

⁶ *Cator v. Pembroke*, 1 Bro. C. C. 301; *Thurman v. Stoddard*, 63 Ala. 336; *Bankhead v. Owen*, 60 Ala. 457. *Houston v. Stanton*, 11 Ala. 412; *Adams v. Buchanan*, 49 Mo. 64; *Moshier v. Meek*, 80 Ill. 79; *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, per Potter, J.; *Bayley v. Greenleaf*, 7 Wheat. 46, in which the early cases are examined, and the *dictum* of Sugden, that purchasers are bound although they had no notice, is declared not to be justified or supported. Mr. Justice Potter, in the New York case cited above, says of the doctrine declared by Sugden, that it had never been held by any court of authority, within the limits of his research.

"To the world," says Chief Justice Marshall,¹ "the vendee appears to hold the estate divested of any trust whatever; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bond fide* creditors." Moreover, to allow this latent and unwritten lien to prevail against purchasers and mortgagees, who in good faith invest their money upon the faith of an unincumbered title of record, would be to discredit and subvert the system of registration, which in this country is universally adopted as the evidence and safeguard of every title.

But a purchaser who has paid nothing is not regarded as a purchaser in law, and the lien will prevail against him.²

200. Or by a mortgage. — A vendor's lien having no validity as against a purchaser for value without notice, it has no validity against one who takes a mortgage as security for a debt contracted at the time, for he is also a purchaser.³ Even an equitable mortgage — one, for instance, arising by means of a mere contract for a mortgage, and nothing more, or by a deposit of title deeds, where, as in England, such a deposit creates an equitable mortgage — may be entitled to priority over the lien, although the lien be prior in time. In contests between persons having only equitable interests, priority of time is the ground of preference last resorted to, or, in other words, only when their equities are in all other respects equal; and the circumstance that the equitable mortgagee has possession of the title deeds has been held to give him the better equity, and to make the maxim, *Qui prior est tempore, potior est jure*, inapplicable.⁴

¹ Bayley v. Greenleaf, *supra*. And see Woody v. Fislar, 55 Ind. 592; Moore v. Holcombe, 3 Leigh (Va.), 597.

² Tucker v. Hadley, 52 Miss. 414.

³ Short v. Battle, 52 Ala. 456; Grown v. Behn, 10 B. Mon. (Ky.) 383. See Bryant v. Stephens, 58 Ala. 636.

⁴ Rice v. Rice, 2 Drew. 73, per Vice Chancellor Kindersley: "The vendors,

when they sold the estate, chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared, in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds

But the lien will still attach to the equity of redemption of the vendee, and upon a foreclosure of the mortgage the lien may be enforced upon the surplus.¹ If the mortgage be given merely to secure a preëxisting debt, it will not prevail against the lien.² The mortgagee is not then a purchaser in good faith for value.

When the consideration of a mortgage is in part a debt already due, and in part a new debt created at the date of the mortgage, the mortgage will be protected against the lien only as to the new debt.³

201. A judgment creditor, who advances his money on the faith of an unincumbered title, is regarded as a *quasi* purchaser for a valuable consideration, and having no notice of the lien, his judgment lien is sustained against the lien of the vendor.⁴ It has even been held that the lien does not affect the rights of the vendee's creditors who have attached the land without notice of it.⁵

But on the other hand it is held that a judgment creditor takes only what belonged to his debtor, and takes, subject to all the equities which exist in favor of the vendor.⁶ The judgment cred-

should remain in their custody, with a memorandum, by way of equitable mortgage, as a security for the unpaid purchase money, and if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute, legal, and equitable owner, free from every shadow of incumbrance or adverse equity. In truth, it cannot be said that the purchaser, in mortgaging the estate by the deposit of the deeds, has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had in effect, by their acts, assured the mortgagee that, as far as they were concerned, the mortgagor had an absolute indefeasible title both at law and in equity." And see *Wilson v. Keating*, 4 De G. & J. 588.

¹ *Brown v. Porter*, 2 Mich. N. P. 12.

See *Arnold v. Patrick*, 6 Paige (N. Y.), 310; *Tinsley v. Tinsley*, 52 Iowa, 14.

² *Chance v. McWhorter*, 26 Ga. 315.

³ *Pepper v. George*, 51 Ala. 190. In this case the court held, partly with reference to the terms of a statute, that a mortgage given in security of a preëxisting debt, although the time of payment is extended and a pending suit is discontinued, does not constitute the mortgagee a purchaser for value, so as to entitle him to protection against an outstanding lien.

⁴ *Bayley v. Greenleaf*, 7 Wheat. 46; *Hulett v. Whipple*, 58 Barb. (N. Y.) 224; *Taylor v. Baldwin*, 10 Ib. 626; *Cook v. Banker*, 50 N. Y. 655; *Robinson v. Williams*, 22 N. Y. 380; *Cook v. Kraft*, 3 Lans. (N. Y.) 512; *Johnson v. Cawthorn*, 1 Dev. & B. (N. C.) Eq. 32; *Aldridge v. Dunn*, 7 Blackf. (Ind.) 249; *Webb v. Robinson*, 14 Ga. 216; *Gann v. Chester*, 5 Yerg. (Tenn.) 205.

⁵ *Allen v. Loring*, 34 Iowa, 499; *Porter v. Dubuque*, 20 Iowa, 440; *Adams v. Buchanan*, 49 Mo. 64.

⁶ *Walton v. Hargroves*, 42 Miss. 18; *Tucker v. Hadley*, 52 Miss. 414; *Thompson v. McGill*, 1 Freem. (Miss.) 401; *Lewis v. Caperton*, 8 Gratt. (Va.) 148.

itor is said to have only an equity, and the vendor's equity, being the better equity, must prevail.

202. The vendee's assignee in bankruptcy takes the property subject to the lien, for it is a settled principle that he takes only the rights and estate of the bankrupt, and subject to all the equities which affected him.¹ An assignee of the vendee, under a general assignment for the benefit of creditors, will also take subject to the vendor's lien.² After such assignment in bankruptcy, or for the benefit of creditors, a bill to enforce the lien should be brought against the assignee and not against the bankrupt.

203. As between this latent lien in equity, and a legal lien by mortgage arising at the same time, the latter will prevail.³ Such a mortgage may attach to the property the moment the land is conveyed to the mortgagee, as, for instance, when a railroad company has executed and recorded a mortgage of all its real estate, both that which it holds at the time and that which it may acquire thereafter; it is well settled that the mortgage attaches to the after-acquired lands as soon as the conveyance is made to the company. The mortgage lien is preferred to the vendor's lien for the purchase money in such case. Where the conveyance in such case was made by an agent of the company, who knew of the existence of the mortgage, there was a further reason for rejecting his claim of a lien, as against the mortgage.⁴

204. Purchaser with notice. — Any one acquiring an interest in land affected by a vendor's lien with notice of its existence takes it subject to the lien.⁵ Upon this point Lord Eldon said:⁶ "There is no doubt that a third person, having full knowledge that the other got the estate without payment, cannot maintain, that though a court of equity will not permit him to keep it, he may give it to another person without payment."

The notice may be actual, as where the purchaser is informed

¹ *Bowles v. Rogers*, 6 Ves. 95; *Ex parte Peak*, 1 Madd. 191; *In re Perdue*, 2 N. Bank. R. 183; and see *Corlies v. Howland*, 26 N. J. Eq. 311.

² *Fawell v. Heelis*, Amb. 724; *Shirley v. Sugar Refinery*, 2 Edw. (N. Y.) 505; *Walton v. Hargroves*, 42 Miss. 18; *Pearce v. Foreman*, 29 Ark. 563; *Warren v. Fenn*, 28 Barb. (N. Y.) 333; *Green v. Demoss*, 10 Humph. (Tenn.) 371; *Brown v. Vanlier*, 7 Ib. 239.

³ *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138.

⁴ *Fisk v. Potter*, *supra*.

⁵ *Ledos v. Kupfrian*, 28 N. J. Eq. 161; *Corlies v. Howland*, 26 N. J. Eq. 311; *Dodge v. Evans*, 43 Miss. 570; *Merritt v. Wells*, 18 Ind. 171; *Webb v. Robinson*, 14 Ga. 216; *Burt v. Wilson*, 28 Cal. 632; *Shall v. Biscoe*, 18 Ark. 142; *Bulger v. Holly*, 47 Ala. 453; *Sampley v. Watson*, 43 Ala. 377; *Gordon v. Bell*, 50 Ala. 213; *Champion v. Brown*, 6 Johns. (N. Y.) Ch. 398; *Stroud v. Pace*, 35 Ark. 100.

⁶ *Mackreth v. Symmons*, 15 Ves. 329; *Carr v. Hobbs*, 11 Md. 285.

of the fact of the purchase by the parties,¹ or constructive, through the pendency of a suit to enforce the lien,² or through recitals in a deed under which the purchaser claims. He is bound by any notice which would put a reasonable man upon inquiry.³ If he has notice that some part of the purchase money is unpaid, it is incumbent upon him to ascertain how much remains unpaid, and he is chargeable with notice of the lien whatever its extent may be.⁴ It is not necessary that he should have notice that the indebtedness for the purchase money constitutes a lien.⁵

The purchaser must pay a new consideration to entitle him to the position of an innocent purchaser for value, and to defend against the equitable lien of the vendor.⁶

205. When the deed, under which the vendee holds, shows by its recitals that the purchase money has not been paid, although the deed be not recorded, a purchaser from him is affected with notice of the outstanding vendor's lien; for he can only make title by a deed which leads him to this fact, and he must therefore be presumed to be cognizant of it.⁷ The fact that the vendee, in his deed conveying the land to another, recites his purchase of the estate from the first vendor, does not affect the purchaser with notice, if the recital does not show that the estate was not paid for.⁸ Nor does the fact that the vendor remains in possession of the land as lessee affect the purchaser with notice that the purchase money remains unpaid.⁹

The fact that a purchaser has the conveyance made to another person, as, for instance, his wife or daughter, but gives his own notes for the purchase money, does not make any difference with enforcement of the lien.¹⁰ Such third person is a mere volunteer,

¹ *Wilson v. Lyon*, 51 Ill. 166; *Harshbarger v. Foreman*, 81 Ill. 364.

² *Tharpe v. Dunlap*, 4 Heisk. (Tenn.) 674; *Tiernan v. Thurman* 14 B. Mon. (Ky.) 277.

³ *Briscoe v. Bronaugh*, 1 Tex. 326; *Parker v. Foy*, 43 Miss. 260; *Autrey v. Whitmore*, 31 Tex. 623.

⁴ *Baum v. Grigsby*, 21 Cal. 176; *Manly v. Slason*, 21 Vt. 271; *Harshbarger v. Foreman*, 81 Ill. 364; *Ledos v. Kupfrian*, 28 N. J. Eq. 161.

⁵ *Brinkerhoff v. Vansciven*, 3 Gr. (N. J.) Ch. 251; *Ledos v. Kupfrian*, *supra*.

⁶ *Perkins v. Swank*, 43 Miss. 349; *Walton v. Hargroves*, 42 Miss. 18; *Chance v. McWhorter*, 26 Ga. 315.

⁷ *Cordova v. Hood*, 17 Wall. 1; *Masich v. Shearer*, 49 Ala. 226; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277; *Thornton v. Knox*, 6 Ib. 74; *Daughaday v. Paine*, 6 Minn. 448; *McRimmon v. Martin*, 14 Tex. 318; *McAlpine v. Burnett*, 23 Tex. 649; *Willis v. Gay*, 48 Tex. 463.

⁸ *Cator v. Pembroke*, 1 Bro. C. C. 301; *Eyre v. Sadleir*, 14 Ir. Ch. 119; 15 Ib. 1.

⁹ *White v. Wakefield*, 7 Sim. 401.

¹⁰ *Doyle v. Orr*, 51 Miss. 229; *Davis v. Pearson*, 44 Miss. 508; *Russell v. Watt*, 41 Miss. 602, 609; *Upshaw v. Hargrove*, 6 S. & M. (Miss.) 286; *Marsh v. Turner*, 4 Mo. 253; *Taylor v. Alloway*, 3 Litt. (Ky.) 216.

not a purchaser without notice, and for value. He is but a recipient of the title, and there is no reason why the lien should not exist against him.

206. A purchaser who defends against the lien, on the ground that he purchased for value without notice, should in his answer briefly state the deed of purchase, the date, the parties, contents, and consideration paid, and that he is seised in fee and possession, with a distinct averment that the consideration was paid in good faith, and was actual, independent of the recital of the deed.¹ He should deny notice previous to and down to the time of paying the money and the delivery of the deed; and if notice be specially charged, he should deny all the circumstances referred to from which notice can be inferred. Whether notice be charged in the bill or not, it should be positively denied in the answer.

This defence is not available to the purchaser, if the purchase money has not been actually paid before notice was received.²

207. A vendor's lien is lost by taking a mortgage, or other independent security for the purchase money,³ unless there be an express agreement that it shall not have this effect.⁴ Taking a mortgage upon the same property would obviously exclude the holding of a lien upon it at the same time,⁵ unless the circum-

¹ *Pearce v. Foreman*, 29 Ark. 563, and cases cited; *Wells v. Morrow*, 38 Ala. 125, 128, and cases cited; *Buford v. McCormick*, 57 Ala. 428.

² *Campbell v. Roach*, 45 Ala. 667; and see *Weaver v. Barden*, 49 N. Y. 286; *Dresser v. Mo. & Iowa Ry. Construction Co.* 93 U. S. 92.

³ *Nairn v. Prowse*, 6 Ves. 752; *Follett v. Reese*, 20 Ohio, 546; *McGonigal v. Plummer*, 30 Md. 422; *Fonda v. Jones*, 42 Miss. 792; *Mayham v. Coombs*, 14 Ohio, 428; *Richardson v. Ridgely*, 8 Gill & J. (Md.) 87; *Lewis v. Covillaud*, 21 Cal. 178; *Denny v. Steakly*, 2 Heisk. (Tenn.) 156; *Adams v. Buchanan*, 49 Mo. 64; *Durette v. Briggs*, 47 Mo. 356; *Carrico v. Farmers' & Merchants' Nat. Bank*, 33 Md. 235; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Vandoren v. Todd*, 2 Green's (N. J.) Ch. 397; *Brinkerhoff v. Vansciven*, 3 Ib. 251; *Dibblee v. Mitchell*, 15 Ind. 435; *Parker County v. Sewell*, 24 Tex. 238; *Brown v. Christie*, 35 Tex. 689; *McDonough v. Cross*, 40 Tex. 251; *An-*

derson v. Griffith, 66 Mo. 44; *Wilson v. Sawyer*, 74 Ill. 473; *Kirkham v. Boston*, 67 Ill. 599; *McLaurie v. Thomas*, 39 Ill. 291; *Richards v. Leaming*, 27 Ill. 431; *Warner v. Scott*, 63 Ill. 368; *Kimble v. Eaworthy*, 6 Bradw. (Ill.) 517; *Stuart v. Harrison*, 52 Iowa, 511; *Fish v. Howland*, 1 Paige (N. Y.), 20; *Vail v. Foster*, 4 N. Y. 312; *Neal v. Speigle*, 33 Ark. 63; *Johnson v. Godden*, 33 Ark. 600.

⁴ § 210; *Daughaday v. Paine*, 6 Minn. 443.

⁵ *Gaylord v. Knapp*, 15 Hun (N. Y.), 87; *Mattix v. Weand*, 19 Ind. 151; *Camden v. Vail*, 23 Cal. 633; *Little v. Brown*, 2 Leigh (Va.), 353; *Young v. Wood*, 11 B. Mon. (Ky.) 123; *Shelby v. Perrin*, 18 Tex. 515; *Escher v. Simmons*, 54 Iowa, 269; *Stuart v. Harrison*, 52 Iowa, 511. In *Pease v. Kelly*, 3 Oreg. 417, the court said that both liens could not exist at the same time, and that the mortgage lien, being the more definite and the higher security, repelled the equitable lien. But *contra*, *Boos v. Ewing*, 17 Ohio, 500; *An-*

stances make the case exceptional, as where the mortgage was taken as the result of proceedings to enforce a vendor's lien after the giving of a subsequent mortgage of which the mortgagee was not aware;¹ and if a mortgage be taken upon a part of the estate purchased, the inference is that it was not intended that the rest of it should be affected by the lien.² But a vendor, who has been induced by fraud and deceit to accept a forged mortgage upon the realty to secure his unpaid purchase money, is not regarded as having abandoned his equitable lien.³ If a mortgage be taken upon another estate of the vendee, the obvious intention of burdening one estate is that the other shall remain free and unincumbered.⁴ The same inference would be drawn from the taking of any pledge for the purchase money; or from taking the personal obligation of some other person alone, or in addition to that of the vendee;⁵ even of the husband or wife of the vendor.⁶

A vendor, who has taken other land conveyed to him with covenants of warranty by the vendee, is deemed to have waived his lien.⁷ The delivery of such other deed in escrow is a waiver of

ketel v. Converse, 17 Ohio St. 11; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *Wasson v. Davis*, 34 Tex. 159; *Irwin v. Garner*, 50 Tex. 48; S. C. 7 Reporter, 479; *Linville v. Savage*, 58 Mo. 248; *Morris v. Pate*, 31 Mo. 315. But still it is a matter of intention. *Partridge v. Logan*, 3 Mo. App. 509.

¹ *Ledos v. Kupfrian*, 28 N. J. Eq. 161.

² *Capper v. Spottiswoode*, Tamlyn, 21; *Bond v. Kent*, 2 Vern. 281; *Brown v. Gilman*, 4 Wheat. 255; *Phillips v. Saunderson*, 1 Sm. & M. (Miss.) Ch. 462; *Fish v. Howland*, 1 Paige (N. Y.), 20, 30; *Hadley v. Pickett*, 25 Ind. 450; *Haskell v. Scott*, 56 Ind. 564; *Dudley v. Dickson*, 14 N. J. Eq. 252.

But when the purchase money does not consist of one entire liability, but of several distinct liabilities, accruing severally, and the corresponding liens are not divisible merely, but are essentially divided and distinct, it has been held that the taking of security for one lien does not waive another lien. *De Forest v. Holum*, 38 Wis. 516.

³ *Fouch v. Wilson*, 60 Ind. 64.

⁴ *Sir Wm. Grant*, in *Nairn v. Prowse*, 6 Ves. 752.

⁵ *Wilson v. Graham*, 5 Munf. (Va.)

297; *Williams v. Roberts*, 5 Ohio, 35; *Campbell v. Henry*, 45 Miss. 326; *Boon v. Murphy*, 6 Blackf. (Ind.) 272; *Carrico v. Farmers' & Merchants' Nat. Bank*, 33 Md. 235; *McGonigal v. Plummer*, 30 Md. 422; *Boynton v. Camplin*, 42 Ill. 57; *Vail v. Foster*, 4 N. Y. 312; *Baum v. Grigsby*, 21 Cal. 172; *Schwarz v. Stein*, 29 Md. 112; *Sanders v. McAfee*, 41 Ga. 684; *Hummer v. Schott*, 21 Md. 307; *Fonda v. Jones*, 42 Miss. 792; *Durette v. Briggs*, 47 Mo. 356; *Stevens v. Rainwater*, 4 Mo. App. 292; *Sears v. Smith*, 2 Mich. 243; *Yaryan v. Shriner*, 26 Ind. 364; *Johnson v. Sugg*, 21 Miss. (13 S. & M.) 346; *Manly v. Slason*, 21 Vt. 271; *Cannon v. Bonner*, 38 Tex. 487; *Carnes v. Hubbard*, 10 Miss. (2 S. & M.) 108. *Contra*, *McClure v. Harris*, 12 B. Mon. (Ky.) 261. And so not waived by taking a guaranteed note, *Burrus v. Boulhac*, 2 Bush (Ky.), 39; *Tiernan v. Thurman*, 14 B. Mon. (Ky.) 277.

⁶ § 198. See, however, *Davis v. Pearson*, 44 Miss. 508; *Partridge v. Logan*, 3 Mo. App. 509.

⁷ *Hare v. Van Deusen*, 32 Barb. (N. Y.) 92. See, however, *Bishop v. Snell*, 37 Ala. 90.

the lien also, and it is not revived by the failure of the depository, wrongfully or otherwise, to deliver the deed to the vendor.¹

When the vendor has retained the legal title until part of the payments have been made, or the deed has remained in escrow by agreement until the first instalment has been met, the delivery of the deed in reliance upon the purchaser's notes is a waiver of the lien.² When the vendor has surrendered an express lien, which was in effect a mortgage, and received part payment, and, for a part, negotiable securities, he is regarded as having waived his lien for this part.³

Yet contrary to the generally received rule some courts go so far in support of this lien as to hold that the presumption of waiver, arising from taking distinct and independent security, may be rebutted by proof that the vendor relied upon the land as well as upon such security;⁴ but there is still a presumption of waiver arising from the taking of such security which will prevail in the absence of proof to the contrary.⁵

208. Although the security prove to be inadequate,⁶ or wholly void,⁷ there is an implied waiver of the lien. The lien once having been waived by the vendor, a court of equity cannot, as a general rule, revive it.⁸ The acceptance of a deed of other lands in payment of part of the purchase price is a waiver of the lien, although the title to such other lands proves to be bad.⁹ But here the authorities are not in harmony; for where a mortgage had been taken of the land to secure the purchase money, but was void for the reason that the husband had not joined in the execution of it, the lien was sustained;¹⁰ and where the vendor had been induced by the fraudulent misrepresentations of the vendee to take the security, it was held he might still rely upon the lien;¹¹ and so where the mortgage was void for misdescription or ambiguity;¹² and it has been held that the vendor does not waive his security by taking, through the fraud of the purchaser,¹³

¹ *Coit v. Fougere*, 36 Barb. (N. Y.) 195.

² *Brown v. Gilman*, 4 Wheat. 255.

³ *Porter v. Dubuque*, 20 Iowa, 440.

⁴ *Faver v. Robinson*, 46 Tex. 204; *Ellis v. Singletary*, 45 Tex. 27; *Willis v. Gay*, 48 Tex. 463.

⁵ *Irvine v. Muse*, 10 Heisk. (Tenn.) 477.

⁶ *Hunt v. Waterman*, 12 Cal. 301; *Partridge v. Logan*, 3 Mo. App. 509.

⁷ *Camden v. Vail*, 23 Cal. 633.

⁸ *Mayham v. Coombs*, 14 Ohio, 428; *Burger v. Potter*, 32 Ill. 66.

⁹ *Willard v. Reas*, 26 Wis. 540.

¹⁰ *Haugh v. Blythe*, 20 Ind. 24; *Fowler v. Rust*, 2 A. K. Marsh. (Ky.) 294; *Champlin v. McLeod*, 53 Miss. 484.

¹¹ *Tobey v. McAllister*, 9 Wis. 463; *Coit v. Fougere*, *supra*.

¹² *Davis v. Cox*, 6 Ind. 481.

¹³ *Skinner v. Purnell*, 52 Mo. 96; *Crippen v. Heermance*, 9 Paige (N. Y.), 211;

or without fraud on his part,¹ worthless security for the purchase money.

209. Whether the security be taken at the time of the conveyance or subsequently, the effect of taking it is generally held to be the same.² But the waiver may in either case be avoided by an express agreement that the lien shall remain, notwithstanding the security.³ When there is no security, the burden is upon the vendee to show that the lien does not exist; but after the taking of security, aside from the personal obligation of the purchaser, the burden is shifted and is upon the vendor to show that the lien has not been waived.⁴

There is no waiver, however, until the security is actually taken, although there be an agreement to receive it.⁵

210. Taking security for the purchase money is only presumptive evidence of a waiver of the lien, according to some authorities.⁶ Although the security be what is termed by the authorities an independent security, — such as a mortgage on other property, a pledge, or the negotiable note of a third party indorsed by the vendee, — it is only evidence of an intention to waive the lien rights, and not conclusive of such intention.⁷ The taking of security is not a waiver of the lien, unless the nature of the security be such that it evinces an intention to waive it;⁸ and, therefore, a mortgage given expressly in aid of the lien has been held not to be a waiver of it.⁹

and see *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Burger v. Hughes*, 5 Hun (N. Y.), 180.

¹ *Duke v. Balme*, 16 Minn. 306. See *Hollis v. Hollis*, 4 Baxter (Tenn.), 524.

² But *contra* held when the security was voluntarily given not in pursuance of the original agreement. *Vandoren v. Todd*, 2 Green (N. J.) Eq. 397.

³ *Daughaday v. Paine*, 6 Minn. 443; *Yaryan v. Shriner*, 26 Ind. 364; *Boon v. Murphy*, 6 Blackf. (Ind.) 272.

⁴ *Bradford v. Marvin*, 2 Fla. 463.

⁵ *Jones v. Vantress*, 23 Ind. 533; *Dunlap v. Burnett*, 13 Miss. (5 S. & M.) 702.

⁶ *Saunders v. Leslie*, 2 Ba. & B. 515; *Cordova v. Hood*, 17 Wall. 1, and cases cited; *Dibblee v. Mitchell*, 15 Ind. 435.

Gibson, C. J., speaking of the circumstances which are held to be a waiver of the lien, says they are so purely arbitrary that the mind is often puzzled to find the

reason of them. "Thus the assumption, that taking an independent security is inconsistent with an intention to retain the lien, is merely gratuitous; for the parties might, in all reason, just as well be supposed to have intended the security to cumulate." *Kauffelt v. Bower*, 7 S. & R. (Pa.) 64, 77.

⁷ *Lavender v. Abbott*, 30 Ark. 172; and see 2 Story's Eq. Juris. § 1226; *De Forest v. Holum*, 38 Wis. 516; *Sanders v. McAfee*, 41 Ga. 684; *Fonda v. Jones*, 42 Miss. 792; *Lawrence v. Meyer*, 35 Ark. 104; *Thames v. Caldwell*, 60 Ala. 644.

⁸ *Corlies v. Howland*, 26 N. J. Eq. 311; *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *Dubois v. Hull*, 43 Ib. 26; and see *Christian v. Austin*, 36 Tex. 540; *Thomason v. Cooper*, 57 Ala. 560.

⁹ *Emison v. Whittlesey*, 55 Mo. 254.

It is said that when it is doubtful whether the security taken should amount to a waiver, the lien should be preserved.¹

The effect of taking independent security may be controlled by express agreement that the lien shall not be waived thereby; or may be controlled by expressions which negative any intention to abandon it.² An express agreement that the lien shall be retained, notwithstanding other security be given for the debt, may be made by a married woman, when the land is conveyed to her, and becomes her separate estate.³

211. The vendor may be estopped to claim the lien by reason of having induced another to purchase the property as unincumbered, upon the representation that the lien no longer existed or would not be claimed.⁴ But his representations will not affect the lien of his vendee, who makes the sale.⁵

3. Who may enforce the Lien.

212. Whether the vendor's lien is assignable with the debt which it secures is a question upon which the authorities are not agreed.⁶ Generally in the United States the lien is considered personal to the vendor, and not assignable except under peculiarly equitable circumstances.⁷ Generally, too, where the lien is consid-

¹ *Wilson v. Lyon*, 51 Ill. 166; *Harris v. Hanks*, 25 Ark. 510.

² *Austen v. Halsey*, 6 Vea. 475, 483; *Elliot v. Edwards*, 3 Bos. & P. 181; *Frail v. Ellis*, 16 Beav. 350.

³ *Mears v. Kearney*, 1 Abb. (N. Y.) N. C. 303. The note given for the land was as follows: "Ninety days after date, I promise to pay to the order of Patrick Kearney one hundred and seventy-five dollars, at the Fifth National Bank, New York, and for the payment of which I pledge my sole and separate estate, being 514 West 43d St., N. Y. Signed, Catherine Kearney. (Indorsed) Patrick Kearney." The inference from the statement and opinion in the case is, that Patrick was her husband; at any rate he was not the vendor. It is also to be inferred that the premises designated in the note were those for the price of which the note was taken. The case was before the N. Y. Superior Court.

⁴ *Henson v. Westcott*, 82 Ill. 224; *Atkinson v. Lindsey*, 39 Ind. 296; *Burns v.*

Taylor, 23 Ala. 255; *Thompson v. Dawson*, 3 Head (Tenn.), 384; *Reily v. Miami Exporting Co.* 5 Ohio, 333.

⁵ *Rowland v. Day*, 17 Ala. 681.

⁶ By the English authorities the lien is held to be assignable by parol. 2 *Dart's V. & P.* (5th ed.) 732, and cases cited.

⁷ Not assignable in the following states:—

Arkansas: The lien is an individual equity, and does not pass by an assignment of the debt. *Carlton v. Buckner*, 28 Ark. 66; *Hutton v. Moore*, 26 Ark. 382, 396; *Williams v. Christian*, 23 Ark. 255; *Shall v. Biscoe*, 18 Ark. 142, 162; *Jones v. Doss*, 27 Ark. 518; *Rogers v. James*, 33 Ark. 77; *Hecht v. Spears*, 27 Ark. 229. But this rule does not apply when the debt has been assigned merely as collateral. *Carlton v. Buckner*, *supra*; *Crawley v. Riggs*, 24 Ark. 563. **California:** *Baum v. Grigsby*, 21 Cal. 172; *Lewis v. Covillaud*, Ib. 178; *Williams v. Young*, Ib. 227; *Ross v. Heintzen*, 36 Cal. 313. **Georgia:** *Webb v. Robinson*, 14 Ga. 216;

ered a personal equity, it is not assignable even by express language. It is strictly personal to the vendor and can be enforced only by him.¹ The prevailing doctrine is, that this lien is implied only in favor of the vendor himself; that it is a personal equity. If the note given for the purchase money be transferred, it does not carry with it to the assignee the vendor's lien, so that he can enforce it in his own name.² It cannot be assigned even by express contract.³ It can be enforced only by the vendor himself; and he cannot enforce it in his name for the benefit of another to whom he has transferred the evidence of the debt.⁴ But if the note comes back to the vendor his lien is said to revive.⁵ The lien, being an incident of the debt, cannot be established by the vendor after he has absolutely transferred the debt to another.⁶

Wellborn v. Williams, 9 Ga. 86. **Illinois**: *Keith v. Horner*, 32 Ill. 524; *Carpenter v. Mitchell*, 54 Ill. 126; *Richards v. Leaming*, 27 Ill. 431; *Moshier v. Meek*, 80 Ill. 79; *Dayhuff v. Dayhuff*, 81 Ill. 499; *Kimble v. Exworthy*, 6 Bradw. 517; *Stagg v. Small*, 4 Ib. 192; *Elder v. Jones*, 85 Ill. 384. **Maryland**: *Dixon v. Dixon*, 1 Md. Ch. 220; *Iglehart v. Armiger*, 1 Bland Ch. 519. **Mississippi**: The lien subsists only so long as the vendor is himself a creditor. It is a personal equity, and does not pass to the assignee of the note or bond. *Pitts v. Parker*, 44 Miss. 247; *Skaggs v. Nelson*, 25 Miss. 88; *Briggs v. Hill*, 6 How. 362; *Walker v. Williams*, 30 Miss. 165; *Stratton v. Gold*, 40 Ib. 778; *Lindsey v. Bates*, 42 Miss. 397; some earlier cases to the contrary. In the recent case of *Perkins v. Gibson*, 51 Miss. 699, Mr. Justice Tarbell said: "The study of the case at bar has induced, in the mind of the writer, these individual impressions for the expression of which he is alone responsible. That the reasons assigned against the transfer or assignment, by contract, of the vendor's lien by implication, are wholly unsatisfactory to him, and he has met with no convincing argument why this lien should not be as available in the hands of assignees and third persons, as that subvendees, with notice, take the land subject thereto. The rule in Kentucky is sustained by the courts of a minority of the states, it is true, but the present impression of the writer is that it is founded

in the better reason and equity." The case was, however, decided upon other grounds. **Missouri**: *Adams v. Cowherd*, 30 Mo. 458, *dictum*. **New York**: Cannot be enforced by an assignee; *White v. Williams*, 1 Paige, 502; but the vendor may enforce it after an assignment when he continues to have a pecuniary interest in the debt. *Smith v. Smith*, 9 Abb. Pr. N. S. 420. **Ohio**: *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, Ib. 437; *Jackman v. Hallock*, 1 Ohio, 318; *Tiernan v. Beam*, 2 Ib. 383. But the lien has been held to pass to a devisee of the notes. *Tiernan v. Beam*, *supra*. **Tennessee**: *Tharpe v. Dunlap*, 4 Heisk. 674, and cases cited; *Green v. Demoss*, 10 Humph. 371; *Cowan v. Sharp*, 11 Heisk. 450; *Bowlin v. Pearson*, 4 Bax. 341; *Pillow v. Helm*, 7 Ib. 545; *McWhirter v. Swaffer*, 6 Ib. 342.

¹ *Keith v. Horner*, 32 Ill. 524; *Richards v. Leaming*, 27 Ill. 431; *Hecht v. Sparks*, 27 Ark. 229; *In re Brooks*, 2 N. Bank. R. 466.

² *Marquat v. Marquat*, 7 How. (N. Y.) Pr. 417; *Stansell v. Roberts*, 13 Ohio, 148; *Skaggs v. Nelson*, 25 Miss. 88; *Richards v. Leaming*, *supra*; *Wing v. Goodman*, 75 Ill. 159.

³ *Keith v. Horner*, *supra*; *McLaurie v. Thomas*, 39 Ill. 291.

⁴ *Elder v. Jones*, 85 Ill. 384.

⁵ *Cotten v. McGehee*, 54 Miss. 510; *Rogers v. James*, 33 Ark. 77.

⁶ *Scott v. Mann*, 36 Tex. 157.

It cannot be invoked in favor of one who has advanced money to a purchaser, with which to pay for the lands;¹ or by one of two joint purchasers who has paid the whole consideration.²

An assignment of a judgment for the purchase money does not pass the benefit of the lien.³

In a few states, however, the lien is regarded as assignable, and the assignee of the debt may enforce the lien in his own name.⁴ But the lien does not pass when the note for the purchase price is assigned by one not rightfully holding it.⁵ When several notes taken for the purchase money are assigned at different times, each note is *pro tanto* an assignment of the lien,⁶ and an assignment of part of a note gives a *pro tanto* interest in the lien.⁷ But a transfer of the note by delivery only, without recourse to the vendor, or liability on his part, does not carry with it the right to enforce the lien.⁸

213. Subrogation to the lien.—Where the lien is not assignable, even by express contract, there can of course be no subrogation of another to the position by the vendor, by implication of law; as, for instance, another person paying the debt due the vendor for purchase money is not subrogated to his lien.⁹ But the rule is otherwise where the lien is held to pass by assignment,¹⁰ and a purchaser with notice, who pays off a lien, is substituted to the rights of the owner as against another incumbrancer.¹¹

214. The lien has been held to exist in favor of a third

¹ *Stagg v. Small*, 4 Bradw. (Ill.) 192; *Gilman v. Dingeman*, 49 Iowa, 308.

² *Brown v. Budd*, 2 Ind. 442; *Woolbridge v. Scott*, 69 Mo. 669.

³ *Turner v. Horner*, 29 Ark. 440.

⁴ Assignable in, —

Alabama: The transfer of the notes carries the lien, which the assignee may enforce. *Wells v. Morrow*, 38 Ala. 125; *White v. Stover*, 10 Ala. 441; *Roper v. McCook*, 7 Ala. 318; *Lang v. Wilkinson*, 57 Ala. 259; *Buford v. McCormick*, 57 Ala. 428. **Indiana**: *Nichols v. Glover*, 41 Ind. 24; *Kern v. Hazlerigg*, 11 Ind. 443; *Wiseman v. Hutchinson*, 20 Ind. 40; *Fisher v. Johnson*, 5 Ind. 492. **Kentucky**: *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 Ib. 465; *Eubank v. Poston*, 5 Mon. 285, 286; *Johnston v. Gwathmey*, 4 Litt. 317, 318; *Broadwell v. King*, 3 B. Mon. 449. **Texas**:

Cannon v. McDaniel, 46 Tex. 303; *White v. Downs*, 40 Tex. 225; *Cordova v. Hood*, 17 Wall. 1; *Watt v. White*, 33 Tex. 421; *Moore v. Raymond*, 15 Tex. 554.

⁵ *Deibler v. Barwick*, 4 Blackf. (Ind.) 339.

⁶ *Davidson v. Allen*, 36 Miss. 419; *Griggsby v. Hair*, 25 Ala. 327; *Robertson v. Guerin*, 50 Tex. 317; *Andrews v. Hobgood*, 1 Lea (Tenn.), 693.

⁷ *Thomas v. Wyatt*, 5 B. Mon. (Ky.) 132.

⁸ *Bankhead v. Owen*, 60 Ala. 457; *Hightower v. Rigsby*, 56 Ala. 126; *Lang v. Wilkinson*, 57 Ala. 259.

⁹ *Nichol v. Dunn*, 25 Ark. 129; *Haskell v. Scott*, 56 Ind. 564.

¹⁰ *Peet v. Beers*, 4 Ind. 46; *Lusk v. Hopper*, 3 Bush (Ky.), 179.

¹¹ *Planters' Bank v. Dodson*, 17 Miss. (9 S. & M.) 527.

person to whom the vendee, at the vendor's request, has agreed to pay a portion of the purchase money.¹ It may exist in favor of one whose land has been sold on execution, and at whose request the sheriff has given credit to the purchaser for so much of his bid as was not required to satisfy the judgment. The transaction may in such case be regarded as in substance to that extent a sale by the owner through the sheriff, and the sheriff's deed to that extent his deed.²

The lien may be established in favor of one who is beneficially the owner of the property sold, although the title stands in another who makes the conveyance to the purchaser.³

In a recent case in Mississippi, it appeared that the owner of land was indebted to another, whom he authorized verbally to sell the land. A sale was made, the owner conveying the land to the purchaser, who gave his note for the amount to the creditor, with the understanding that it was to be a lien upon the land.⁴ Notwithstanding the rule prevalent in this state, that the lien is not assignable by a transfer of the note given for the purchase money, it was held that the land in this case was bound by the lien in favor of the creditor, to whom the note was given; and yet it has been held in this state that a third person to whom one of the purchase money notes is given at the request of the vendor cannot enforce the lien for that note.⁵

The decision was based upon a distinction between vendor and grantor; and it was considered that the person to whom the note was given was, under the circumstances, really the vendor.

215. An indorsement of the note "without recourse" does not carry the lien.⁶ And yet a qualification has been made of even this proposition, for it is held that when, after such an assignment, the note is taken up by the vendor and reassigned,

¹ *Francis v. Wells*, 2 Colo. 660; *Mitchell v. Butt*, 45 Ga. 162; *Latham v. Staples*, 46 Ala. 462; *Campbell v. Roach*, 45 Ala. 667; *Thompson v. Thompson*, 3 Lea (Tenn.), 126.

² *Yarborough v. Wood*, 42 Tex. 91.

³ *Russell v. Watt*, 41 Miss. 602.

⁴ *Perkins v. Gibson*, 51 Miss. 699.

The cases of *Kelly v. Mills*, 41 Miss. 267; *Russell v. Watt*, *Ib.* 602, are cited as fully recognizing this distinction. Mr. Justice Tarbell reviews the decisions upon the point whether the lien is affected by the substitution of another person for the

vendor in the giving of the notes, approving the decision in *Pinchain v. Collard*, 13 Tex. 333; and he expresses his individual opinion in favor of the broad position that the benefit of the lien should pass by an assignment of the note.

⁵ *Rutland v. Brister*, 53 Miss. 683.

⁶ *Schnebly v. Ragan*, 7 G. & J. (Md.) 120; *Johnson v. Nunnerly*, 30 Ark. 153; *Williams v. Christian*, 23 Ark. 255; *Smith v. Smith*, 9 Abb. (N. Y.) Pr. N. S. 420; *Bankhead v. Owen*, 60 Ala. 457. *Contra*, *Davidson v. Allen*, 36 Miss. 419.

whereby the note and lien are again united in the same party, the lien then attaches.¹

216. As an exception to the rule that the lien is not assignable by a transfer of the note, or other obligation given for the purchase money, it is held that when the transfer is for the payment of a debt of the vendor's, or is made as collateral security for his debt, the lien passes with the assignment. The reason is said to be, that when the assignment is made for the benefit of a third person, or he is merely a purchaser of the note, there is no peculiar equity in his favor; but when the transfer is for the security or payment of the vendor's own debt, the equity continues; the assignee, in such case, holding the lien as well for the benefit of the assignor as for himself, is subrogated to all his equities.²

In like manner it is held that if the vendor indorse the note, and is afterwards obliged to take it up at maturity upon the failure of the vendee to pay, or if the note in any way comes back into the vendor's possession as his own, then both the debt and the lien, which had been separated by the assignment, are again united in the vendor, who may enforce the lien. The lien revives, and, as the owner of the note, the vendor may enforce it as though the assignment had never been made.³

217. The lien is not lost by a mere change in the form of the debt, as, for instance, the taking of a new note.⁴ And it is held by some authorities, that the vendee's giving of his note at the vendor's request to a third person, to whom he was indebted, or to whom he gives the amount, does not affect it so long as the original consideration remains;⁵ and that it is immaterial to whom the acknowledgment of the debt is made, when this is done at the request of the vendor.⁶

But if the original note be cancelled, and a new one given to another person, the lien is lost;⁷ and a verbal agreement by all

¹ *Bernays v. Feild*, 29 Ark. 218.

² *Carlton v. Buckner*, 28 Ark. 66; *Crawley v. Riggs*, 24 Ark. 563; *Plowman v. Riddle*, 14 Ala. 169; *Hallock v. Smith*, 3 Barb. (N. Y.) 267, 272.

³ *Kelly v. Payne*, 18 Ala. 371; and see *Turner v. Horner*, 29 Ark. 440; *Bernays v. Feild*, *ib.* 218; *White v. Williams*, 1 Paige (N. Y.), 502; *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *Lindsey v. Bates*, 42 Miss. 397.

⁴ *Cordova v. Hood*, 17 Wall. 1; *Alldridge v. Dunn*, 7 Blackf. (Ind.) 249; *Dibrell v. Smith*, 40 Tex. 447; *Flanagan v. Cushman*, 48 Tex. 241; *Robertson v. Guerin*, 50 Tex. 317.

⁵ *French v. Dickey*, 3 Tenn. Ch. 302.

⁶ *Hamilton v. Gilbert*, 2 Heisk. (Tenn.) 680; *Nichols v. Glover*, 41 Ind. 24.

⁷ *Hurlock v. Smith*, 39 Md. 436; *Phelps v. Conover*, 25 Ill. 309, 314. So held,

the parties that the lien should be retained, does not save it. Neither is it lost by obtaining a judgment upon a note.¹ At most, the obtaining of judgment can only be regarded as a circumstance bearing upon the question whether there was a waiver or not.² But the lien is waived by obtaining a judgment for the purchase money together with a claim for the price of personal property, if the two claims are so mingled together as to render it impossible to determine how much of the judgment represents the price of the land and how much the value of the personal property.³

4. *The Remedy.*

218. When the debt is barred, the vendor's lien cannot be enforced. It exists solely in the debt and is a mere remedy or security for this; the lien is barred by the same lapse of time that bars the debt.⁴ Moreover this lien "has no existence until it has been declared to exist by a court of equity;"⁵ and if the debt is gone before the lien is established there can be nothing to establish the lien for. It cannot exist distinct from the debt.⁶ The lien may be enforced for the first note when that becomes due.⁷

But the rule is otherwise in Maryland, where, though the debt be barred, the lien continues, like a mortgage lien, for twenty years.⁸

A vendor is barred by the continuous possession of the vendee for twenty years, or such other length of time as would bar a mortgagee of his right to foreclose a mortgage.⁹

The only remedy for enforcing the lien is a suit in equity, inasmuch as the lien is altogether a thing of equity and does not exist in law. If a personal obligation has been taken for the debt, an action at law upon this cannot be brought at the same time with a suit in equity to enforce the lien. If the claim be not satisfied by one remedy the other may be resorted to.¹⁰

also, in Texas, when additional security was given. *Jackson v. Hill*, 39 Tex. 493.

¹ *In re Perdue*, 2 N. Bank R. 183; *Ball v. Hill*, 48 Tex. 634.

² *Dubois v. Hull*, 43 Barb. (N. Y.) 26.

³ *Clark v. Stilson*, 36 Mich. 482.

⁴ *Trotter v. Erwin*, 27 Miss. 772; *Ball v. Hill*, *supra*; *Pitschki v. Anderson*, 49 Tex. 1. *Contra*, *Bizzell v. Nix*, 60 Ala. 281, *Manning, J.*, dissenting; *Flinn v. Barber*, 61 Ala. 530.

⁵ *Linthicum v. Tapscott*, 28 Ark. 267.

⁶ *Borst v. Corey*, 15 N. Y. 505.

⁷ *Furr v. Morgan*, 55 Miss. 389.

⁸ *Magruder v. Peter*, 11 G. & J. (Md.) 217; *Baltimore & Ohio R. R. Co. v. Trimble* 51 Md. 99.

⁹ *Thompson v. Thompson*, 3 Lea (Tenn.), 126.

¹⁰ *Barker v. Smark*, 3 Beav. 64.

219. Whether the remedy at law must first be exhausted, or shown not to exist, before a bill in equity can be filed to enforce the lien, is a question upon which the courts are not agreed. On the one hand it is held that the purchase money is a debt payable out of the purchaser's personal estate, and the equitable lien exists for only so much of the debt as the personal estate is sufficient to answer. "The vendor," says Sugden,¹ "has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient. If by a proceeding at law he can recover the debt, equity will not interfere to enforce the lien."²

A different rule prevails in several states, where the vendee may enforce his lien in the first instance, without having taken any steps to collect the debt at law.³

In some states a different doctrine of the nature of the lien prevails under which the lien is enlarged, and made more like that which exists under the civil law. It is declared to arise and exist at the time of the sale, and to result from the sale on credit without other security, regardless of the subsequent inability of the purchaser to pay, or of failure to compel him to do so by suit at law.⁴

220. Parties to bill to enforce lien. — The vendor's lien upon the death of the vendor follows the debt, and may be enforced by the person entitled to enforce the debt itself.⁵ A specific bequest of the claim for the purchase money carries the lien with it.⁶ Ordinarily the right to enforce the lien after the death of the vendor belongs to the personal representative.⁷ When lands are sold by an administrator under an order of court,

¹ Vendors & Purchasers, 394. To same effect, *Gilman v. Brown*, 1 Mason, 191; *Martin v. Cauble*, 72 Ind. 67.

² *Pratt v. Vanwyck*, 6 G. & J. (Md.) 495; *Richardson v. Stillinger*, 12 Ib. 477; *Ridgeway v. Toram*, 2 Md. Ch. 303; *Ford v. Smith*, 1 McAr. (D. C.) 592; *Eyler v. Crabbs*, 2 Md. 137; *Roper v. McCook*, 7 Ala. 318; *Bottorf v. Conner*, 1 Blackf. (Ind.) 287; *Russell v. Todd*, 7 Ib. 239.

In Maryland it is now provided by statute that the Court of Chancery may decree a sale to enforce a vendor's lien upon any estate in lands whether legal or equitable, although the complainant may have a perfect remedy at law for the

money for which the lien is claimed. *R. Code*, 1878, art. 66, § 5, p. 654.

³ *High v. Batte*, 10 Yerg. (Tenn.) 186; *Pratt v. Clark*, 57 Mo. 189; *Richardson v. Baker*, 5 J. J. Marsh. (Ky.) 323; *Stewart v. Caldwell*, 54 Mo. 536; *Bradley v. Bosley*, 1 Barb. (N. Y.) Ch. 125; *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Owen v. Moore*, 14 Ala. 640; *Campbell v. Roach*, 45 Ala. 667.

⁴ *White v. Downs*, 40 Tex. 225.

⁵ 2 Story Eq. Jur. § 1227.

⁶ *Tiernan v. Beam*, 2 Ohio, 383, 386; *Lavender v. Abbott*, 30 Ark. 172.

⁷ 2 Story Eq. Jur. § 789; *Dayhuff v. Dayhuff*, 81 Ill. 499.

the right to enforce the lien for the purchase money ordinarily belongs to him ;¹ but when the sale is made for the purpose of division among the heirs, who are the beneficiaries, and the existence of debts or other necessity for an administrator is not shown, the heirs may maintain a bill in their own names to enforce the lien.²

The administrator of a deceased vendee having no interest in the land is not a necessary party to a suit to enforce the lien.³ His heirs at law or devisees are necessary parties.⁴ His widow, having a contingent interest in the surplus, is a proper party.⁵ But after a sale of the land by the vendee's administrator in his official capacity, to one who had notice of the lien, who is made a party to the bill, it is not necessary to join the heirs.⁶

Subsequent purchasers, mortgagees, and other holders of liens in the property should be made parties defendant to the suit or they will not be bound.⁷

A mere tenant or agent in possession of the land, but having no interest in it, is not a proper defendant.⁸

221. The bill and decree. — A bill to enforce a vendor's lien should contain a sufficient description of the land upon which it is sought to enforce it, to enable the court to render an effectual decree of sale.⁹

The vendee cannot allege defects in the title as a defence to the bill unless he has been evicted. He must look to his covenants.¹⁰ In case, however, the sale was induced by frauds and the vendor is insolvent, the vendee may by cross-bill set up the defects and the frauds ; and in case there was a covenant of seisin by one who had no title, a right of action arises as soon as the covenant was made, and no eviction is necessary to enable the vendee to avail himself of this defence.¹¹

When some of the notes secured by it are not due, a sale can be decreed only of so much of the land as will suffice to pay the debt then accrued and the costs of suit, leaving the other notes

¹ *Knight v. Blanton*, 51 Ala. 333.

² *Knight v. Blanton*, *supra*.

³ *Edwards v. Edwards*, 5 Heisk. (Tenn.)

123 ; *M'Kay v. Green*, 3 Johns. (N. Y.) Ch. 56.

⁴ *Jackson v. Hill*, 39 Tex. 493 ; and see *Converse v. Sorley*, 39 Tex. 515.

⁵ *Edwards v. Edwards*, *supra*.

⁶ *Thornton v. Neal*, 49 Ala. 590.

⁷ *Carter v. Attoaway*, 46 Tex. 108 ;

Turner v. Phelps, 46 Tex. 251 ; *Davis v. Rankin*, 50 Tex. 279.

⁸ *Milner v. Ramsey*, 48 Ala. 287 ; *Reed v. Gregory*, 46 Miss. 740.

⁹ *Long v. Pace*, 42 Ala. 495 ; *Williams v. Roe*, 59 Ala. 629.

¹⁰ *Leird v. Abernathy*, 10 Heisk. (Tenn.) 626 ; *Cohen v. Woollard*, 2 Tenn. Ch. 686.

¹¹ *Leird v. Abernathy*, *supra*.

to stand as a lien upon the remainder of the land.¹ It is erroneous to decree a sale subject to the lien of the remaining notes.

A vendor having liens upon separate parcels of land sold to the same vendee at different times cannot have a decree for the aggregate amount of the liens, and for the sale of all the land to satisfy it; but the decree must be for the sale of each tract for the amount due upon it specifically. The lien is distinct for each parcel.²

The decree may, as in case of a decree of sale in a suit to foreclose a mortgage, allow a time for redemption before the sale; and if by statute a time for redemption after sale is allowed in case of a sale under foreclosure of a vendor's lien, the decree should not direct a delivery of the deed till such time has passed.³

222. Marshalling assets.—When land subject to a vendor's lien is subsequently mortgaged to one, who in good faith, and without notice of the lien, pays a valuable consideration for his title, he acquires a priority over the vendor, and is entitled to have his claim satisfied in preference to the claim of the vendor for the unpaid purchase money. But if the mortgagee has also security for his claim upon other real or personal property, he may be compelled in equity to exhaust his remedy upon such security before resorting to the lands affected by the vendor's lien; and if any part of the personal security be wasted or misapplied through his fault or negligence, he must bear the loss.⁴

As a general rule, upon the decease of the vendee his heir or devisee is entitled to have the unpaid purchase money paid out of the personal property.⁵

PART II.

THE VENDEE'S LIEN.

223. Money paid by a vendee of land prematurely, or before receiving a conveyance, is a charge upon the estate in the hands of the vendor, or in the hands of his grantee with notice.⁶

¹ §§ 1500-1505; *Emison v. Risque*, 9 Bush (Ky.), 24; *Burton v. McKinney*, 6 Ib. 428; and see *Codwise v. Taylor*, 4 Sneed (Tenn.), 346.

² *Edwards v. Edwards*, 5 Heisk. (Tenn.) 123.

³ *Webber v. Mackey*, 4 Bradw. (Ill.) 458.

⁴ *Gordon v. Bell*, 50 Ala. 213.

⁵ *Wright v. Holbrook*, 32 N. Y. 587; *Lamport v. Beeman*, 34 Barb. (N. Y.) 239; *Livingston v. Newkirk*, 3 Johns. (N. Y.) Ch. 312; *Warner v. Van Alstyne*, 3 Paige (N. Y.), 513; *Sutherland v. Harrison*, 86 Ill. 363.

⁶ 2 Story Eq. § 1217; *Lane v. Ludlow*,

"There can be no doubt, I apprehend," says Lord Cranworth,¹ "that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if, upon the payment of part of the purchase money, the vendor had executed a mortgage to him of the estate to that extent. It seems to me, that that is founded upon such solid and substantial justice, that if it is true that there is no decision affirming that principle, I rejoice that now, in your lordship's house, we are able to lay down a rule that may conclusively guide such questions for the future. I think, however, that there are some authorities which have been pointed out, which have established that rule in principle if not in terms. But I think it is unimportant to go into that, because it is now established, and will from henceforth be established as a very sound principle, founded on solid justice."

224. Upon the rescission of a contract of sale, it seems there should be a lien for the purchase money paid upon it in those states where a vendor's implied lien exists.² If there has been a sale and conveyance of the land in the first place, there is no reason why the lien should not arise upon a resale and reconveyance of the property.³ The lien will then arise from the conveyance in the same manner as it arose upon the first conveyance.

6 Paige (N. Y.), 316, n.; Chase v. Peck, 21 N. Y. 581, 585; Wickman v. Robinson, 14 Wis. 493; Cooper v. Merritt, 30 Ark. 686; Stewart v. Wood, 63 Mo. 252; Brown v. East, 5 Mon. (Ky.) 405, 407; Wickman v. Robinson, *supra*; Shirley v. Shirley, 7 Blackf. (Ind.) 452.

¹ Rose v. Watson, 10 H. L. Cas. 672; and see, also, Wythes v. Lee, 3 Drew. 396; Cator v. Pembroke, 1 Bro. C. C. 301.

In California it is provided that one who pays to the owner any part of the

price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration. Civil Code, 1872. See 3050.

² See § 181.

³ Scott v. Griggs, 49 Ala. 185; Napier v. Jones, 47 Ala. 90. See Willis v. Searcy, 49 Ala. 222.

PART III.

THE VENDOR'S LIEN BY CONTRACT OR RESERVATION.

1. *Nature and Extent of such Lien.*

225. A lien by contract is not a vendor's lien. The interest of a vendor who has given an ordinary contract or bond for the sale of land, but retains the title to the land in himself, is often spoken of in the cases as a vendor's lien;¹ but it is conceived that this is a misuse of terms, which should be avoided as leading to confusion. There is a fundamental distinction between a vendor's security in such case and the lien implied by law, and properly known as a vendor's lien. When the legal title remains in the vendor, the vendee has merely an equity of redemption in the land, and no act of his can possibly affect the vendor's title; while in case of a mere lien in the vendor, the fee is in the purchaser, who may at any time discharge the lien by conveying the land to a *bond fide* purchaser for value.² In the one case the vendor has a lien without any title, and in the other he has the title without any occasion for a lien. His title, by the terms of the contract, is his security; and he cannot in any way be divested of his title, except the vendee fulfil his contract, and by that means become entitled to a conveyance. As already noticed, the relation of the vendor and vendee in such case bears a strong similitude to that of mortgagee and mortgagor. The vendor, having the title, has a substantial security; having no title, he has by implication a lien in name, but it exists only in name until a court of equity has given it force by a decree.³ A lien by contract "has none of the odious characteristics of the vendor's equitable lien."⁴

It is just as proper to call a mortgage given for purchase

¹ See, of recent cases, *Stevens v. Chadwick*, 10 Kans. 406; *Smith v. Rowland*, 13 Kans. 245; *Neel v. Clay*, 48 Ala. 252; *Hill v. Grigsby*, 32 Cal. 55.

² *Church v. Smith*, 39 Wis. 492, 496, per Lyon, J.; *Sparks v. Hess*, 15 Cal. 186, 194, per Ch. J. Field; *Driver v. Hudspeth*, 16 Ala. 348; *Wells v. Smith*, 44 Miss. 296; *Pitts v. Parker*, 44 Miss. 247; *Hutton v. Moore*, 26 Ark. 382; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *Reese v. Burts*, 39 Ga. 565.

³ "It is, in short, a right which has no existence, until it is established by the decree of a court in the particular case." Per Story J., in *Gilman v. Brown*, 1 Masson, 191. "His lien is an individual equity, of no force until declared by a court of equity." *Hutton v. Moore*, 26 Ark. 382, 396, quoted in *Campbell v. Rankin*, 28 Ark. 401, 406.

⁴ Per Ch. Justice Watkins, in *Moore v. Anders*, 14 Ark. 628, 634.

money a vendor's lien, as to call by that name the lien of one who has given a contract to sell, but retains the legal title, or who has reserved a lien in his deed of conveyance.

It is often said that a vendor's lien may arise as well before the conveyance as after it.¹ But the same courts which give this name to the lien retained by a vendor, who holds the legal title as security for the performance of the contract of sale, generally proceed to point out the differences between this lien and that which is implied upon a conveyance; and inasmuch as the only likeness between the two liens is in their both securing the purchase money, it is proposed, in treating of the subject, to confine the term "vendor's lien" to that lien which is in equity implied to belong to a vendor for the unpaid purchase price of land sold and conveyed by him.

226. The legal effect of a title bond is sometimes said to be like a deed by the vendor and a mortgage back by the vendee. The vendor holds the legal title, and all persons must necessarily take notice of it, and although the vendee enter into possession, his deed will of course convey only his equitable title. Like a mortgagor in possession he has an equity of redemption, while the vendor holds the title by reservation rather than by grant, as in the case of an ordinary mortgage. The equitable estate of the vendee may be alienated or devised as real estate, and upon his death it will descend to his heirs; while on the other hand, although the vendor holds the legal title, upon his death the securities he has taken for the purchase money go to his personal representative.² Although the vendor's remedy upon the note or contract or bond taken for the purchase money be barred by the statute of limitations, or by the discharge in bankruptcy of the vendee, the lien upon the land is not affected. As in respect to mortgages, the vendor's lien will in such case be presumed to

¹ *English v. Russell*, 1 Hempst. 35; *Yancey v. Mauck*, 15 Gratt. (Va.) 300; *Hill v. Grigsby*, 32 Cal. 55; *Amory v. Reilly*, 9 Ind. 490; *Servis v. Beatty*, 32 Miss. 52. Distinguished in *Wright v. Troutman*, 81 Ill. 374.

² *Smith v. Moore*, 26 Ill. 392; *Smith v. Price*, 42 Ill. 399; *Button v. Schroyer*, 5 Wis. 598; *Lewis v. Hawkins*, 23 Wall. 119; *Martin v. O'Bannon*, 35 Ark. 62; *Holman v. Patterson*, 29 Ark. 357; *Lewis v. Boskins*, 27 Ark. 61; *Scroggins v. Hoadley*, 56 Ga. 165; *Lingan v. Hender-*

son, 1 Bland (Md.) Ch. 236; *Relfe v. Relfe*, 34 Ala. 500, 504; *Masterson v. Pullen*, 62 Ala. 145; *Cleveland v. Martin*, 2 Head (Tenn.), 128; *Irvine v. Muse*, 10 Heisk. (Tenn.) 477; *Sehorn v. McWhirter*, 8 Bax. (Tenn.) 201; 8 C. 6 Ib. 311; *Richards v. Fisher*, 8 W. Va. 55; *Merritt v. Judd*, 14 Cal. 59; *Purdy v. Bullard*, 41 Cal. 444; *Dukes v. Turner*, 44 Iowa, 575; *Greene v. Cook*, 29 Ill. 186; *McConnell v. Beattie*, 34 Ark. 113; *Scheaff v. Dodge*, 33 Ark. 340, 345; *Walkenhorst v. Lewis*, 24 Kans. 420.

have been satisfied after the lapse of twenty years, and the continued possession of the vendee ;¹ and on the other hand, if the vendor remain in possession, so long as he recognizes the vendee as the equitable owner the statute does not begin to run ; and after it does begin to run, the vendee may at any time within the same period redeem the title.²

When after such a contract the vendor, at the request of the vendee, pays for improvements upon the property, which by the terms of the contract the vendee was himself to make before receiving a conveyance, the amount so paid becomes a further lien upon the property, which the vendor may enforce by a sale of the vendee's interest under the contract.³

227. The holder of the contract cannot impair the security. The legal title of the vendor in such case is not affected by any liens created by the person who holds the contract of purchase, as, for instance, a mechanic's lien for labor and materials furnished him ;⁴ or a conveyance or mortgage by him ;⁵ or a judgment or attachment against him.⁶ Such claims necessarily arise after the lien created by the contract, and must be subject to that lien. The vendee cannot possibly do anything to impair that lien any more than a mortgagor can, after the execution of his mortgage, do anything with his title to impair that security. But if the vendor, after a lien has attached to the interest of the vendee for materials used in the construction of a house upon the premises, takes a reconveyance of the premises, and as a part of the consideration of the reconveyance assumes the lien debt, the lien may be enforced against the whole land.⁷

After a title bond or a contract of sale has been given for the conveyance of lands upon the payment of the purchase money, the lands are not subject to sale under execution at law at the suit of one obtaining judgment afterwards against the vendor ; the lien of the vendee prevails against the lien of the judgment creditor, which can operate only upon the interest which the vendor had at the time of its rendition.⁸

¹ *Lewis v. Hawkins*, 23 Wall. 119.

² *Harris v. King*, 16 Ark. 122.

³ *Grove v. Miles*, 71 Ill. 376 ; S. C. 58 Ill. 338.

⁴ *Seitz v. U. P. R. Co.* 16 Kans. 133 ;
Cochran v. Wimberly, 44 Miss. 503 ;
Thorpe v. Durbon, 45 Iowa, 192.

⁵ *Sitz v. Deihl*, 55 Mo. 17 ; *Harvill v.*

Lowe, 47 Ga. 214 ; *Carter v. Sims*, 2 Heisk. (Tenn.) 166.

⁶ *Hadley v. Nash*, 69 N. C. 162 ; *Roberts v. Francis*, 2 Heisk. (Tenn.) 127 ;
Tuck v. Calvert, 33 Md. 209.

⁷ *Adams v. Russell*, 85 Ill. 284.

⁸ *Shinn v. Taylor*, 28 Ark. 523 ; *Money v. Dorsey*, 7 S. & M. (Miss.) 15, 22 ; *Taylor v. Eckford*, 11 Ib. 21.

228. An express reservation in a deed of a lien upon the land conveyed creates an equitable mortgage, and when the deed is recorded every one is bound to take notice of the incumbrance.¹ Thus, where land was sold, and for the purchase money several promissory notes of the purchaser were taken, and these were described in the deed of conveyance, and expressly made a lien upon the lands conveyed, a purchaser on execution obtained only an equity of redemption subject to such lien.²

To create such a lien there must be something more than a mere recitation that the purchase money, to a certain amount, remains unpaid; this amount must be expressly charged upon the land conveyed.³ But a grant of land, "to have and to hold the same under and subject, nevertheless, to the payment" of a certain sum at the decease of the grantee, constitutes a charge upon the land, in whosoever hands it may be.⁴ A deed of land "charged with the payment" of certain specified sums creates a lien in the nature of a mortgage, and not in the nature of a vendor's lien.⁵ A lien is effectually reserved in a deed which describes the notes given for the purchase money, and the habendum is "to have and to hold on the payment of the notes herein above stated."⁶ No particular words are essential for creating a lien by express reservation. All that is necessary is, that the words used should distinctly convey the idea that the vendor retains a lien on the land. A stipulation that the "land shall be bound for the notes" given for the purchase money creates an effectual lien.⁷

A stipulation in a deed, that the title shall not vest in the grantee until the purchase money is paid, amounts in equity to a mortgage.⁸ So does a deed providing that it shall be absolute on

¹ *Ufford v. Wells*, 52 Tex. 612; *Webster v. Mann*, 52 Tex. 416; *Baker v. Compton*, 52 Tex. 252.

² *Davis v. Hamilton*, 50 Miss. 213; *Stratton v. Gold*, 40 Miss. 778, 781; *Caldwell v. Fraim*, 32 Tex. 310. Quoted with approval in *Hall v. Mobile & Montgomery Ry. Co.* 58 Ala. 10, 22.

³ *Heist v. Baker*, 49 Pa. St. 9. There is a broad distinction between the rights of a vendor under an absolute deed with warranty which recites the existence of unpaid purchase money notes, but retains no express lien in terms for their payment, and his rights under a deed which declares that a lien is reserved for unpaid

purchase money. Under the former, the vendor has parted with title, and has only an implied vendor's lien for purchase money; under the latter, the superior title remains with the vendor, and the deed is the evidence of an executory contract. *Baker v. Compton*, 52 Tex. 252, per Gould, J.

⁴ *Heist v. Baker*, *supra*.

⁵ *Stanhope v. Dodge*, 52 Md. 483.

⁶ *Blaisdell v. Smith*, 3 Bradw. (Ill.) 150.

⁷ *Moore v. Lackey*, 53 Miss. 85.

⁸ *Pugh v. Holt*, 27 Miss. 461; *Lavigne v. Naramore*, 52 Vt. 267.

the payment of certain notes, but in default of payment shall be void.¹

229. A lien reserved is a lien by contract. A lien for the purchase money expressly reserved by a vendor in his deed of conveyance is a lien created by contract, and not by implication of law. It is a contract that the land shall be burdened with the lien until the note is paid. It is really a mortgage. The lien, then, becomes a matter of record when the deed is recorded.² It is not waived by the taking of other security, as is the case with an ordinary vendor's lien.³ It is governed by the same rules that a mortgage is. It passes by an assignment of the note secured by it.⁴ It is foreclosed as a mortgage; and there is the same right of redemption for a limited period after a foreclosure sale.⁵

"The reservation of the vendor's lien in the deed of conveyance," says Mr. Justice Bradley, of the Supreme Court of the United States,⁶ "is equal to a mortgage taken for the purchase money contemporaneously with the deed, and nothing more. The purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money." The legal title passes to the purchaser subject to the lien, and the land is subject to attachment and execution as his property just as an equity of redemption is.⁷

The lien differs also from a vendor's lien in that it may secure the performance of any covenant or undertaking agreed upon, instead of a fixed sum payable in money; as, for instance, it may secure an agreement to pay in specific articles.⁸

¹ Carr v. Holbrook, 1 Mo. 240.

² Armentrout v. Gibbons, 30 Gratt. (Va.) 632; White v. Downs, 40 Texas, 225, 226, per Gray, J. "The vendor's lien, however, properly understood, is not in all respects the same as the express lien often reserved in deeds of conveyance for payment of purchase money, nor as strict mortgages or deeds of trust for it, nor yet as the security held by a vendor who has only given a bond for the title. These are often confounded with the vendor's lien, because security of the purchase money is common to all of them. But the vendor's lien arises wholly from inference or implication, which is invisible, and cannot be recorded; the others are from express contract, visible to all, and may be recorded. All of the same

consequences do not, therefore, necessarily result, as to assignees or holders of the debt secured by the vendor's lien, nor as to purchasers of the land liable to it, as between the original parties and privies, as do often occur in the cases of express lien by contract." See, also, Moore v. Lackey, 53 Miss. 85.

³ Carpenter v. Mitchell, 54 Ill. 126.

⁴ Carpenter v. Mitchell, *supra*; Markoe v. Andras, 67 Ill. 34.

⁵ Markoe v. Andras, *supra*. Quoted with approval in Hall v. Mobile & Montgomery Ry. Co. 58 Ala. 10, 22.

⁶ King v. Young Men's Ass'n, 1 Woods, 386.

⁷ Chitwood v. Trimble, 58 Tenn. 78.

⁸ Harvey v. Kelly, 41 Miss. 490.

230. The vendee's title is imperfect until the debt is paid. When land has been conveyed by a deed, reserving a lien upon it for the purchase money, the lien is an incumbrance upon it, and an execution sale of it as the property of the vendee should be made as of incumbered property.¹ It has precedence over a prior judgment against the vendee.²

The vendee's title is imperfect until this debt is paid. Every one purchasing his title must have notice of the lien reserved. He has notice only of the debt and simple interest, unless more be reserved.³ This lien is in fact an equitable mortgage. In the case of an implied lien, the courts have generally been unwilling to extend it beyond the security of the vendor, because it might tend to embarrass the vendee's right of disposing of the property by giving countenance to secret liens upon it; but this reason does not apply when the lien is reserved by express contract in the deed.⁴

The effect of a lien expressly reserved cannot be controlled by evidence of a verbal agreement that there should be no lien.⁵

In Pennsylvania, however, the law upon this subject is exceptional; for it is held that a charge upon land created by the parties to a conveyance is divested by a subsequent sheriff's sale, unless the charge be in the nature of a testamentary provision for the grantor's wife or children, or is incapable of valuation, or is expressly created to run with the land.⁶ It is declared that the doctrine of equitable liens was never admitted into the jurisprudence of this state. Moreover the policy of the law is, that judicial sales shall pass property clear of all liens, and the courts have yielded with reluctance to making the exceptions above named. Accordingly it is held that a recital in a deed that the purchase money remains unpaid, and is to be paid annually, does not create a lien which a subsequent judicial sale will not divest.⁷ Neither does a recital that the deed is made subject to a mortgage held by a person named for a specified sum create such a lien, when there was in fact no mortgage, but a judgment which subsequently expired. It was urged that the deed created a charge

¹ *Thompson v. Heffner*, 11 Bush (Ky.), 353.

² *Parsons v. Hoyt*, 24 Iowa, 154.

³ *Stricklin v. Cooper*, 55 Miss. 624.

⁴ *Stratton v. Gold*, 40 Miss. 778; *Peters v. Clements*, 46 Tex. 114; *Masterson v. Cohen*, 46 Tex. 520.

⁵ *Hutchinson v. Patrick*, 22 Tex. 318.

⁶ *Strauss's App.* 49 Pa. St. 353; *Hiesterv. Green*, 48 Ib. 96; *Bear v. Whisler*, 7 Watts (Pa.), 144; *Stewartson v. Watts*, 8 Ib. 392.

⁷ *Hiesterv. Green*, *supra*.

upon the land, and that as this charge appeared upon the face of the title, a subsequent mortgagee had notice of it and took subject to it. But it was held, inasmuch as this recital did not amount to a condition, and inasmuch as the charge was not within either of the exceptions named, it was divested and destroyed by a sheriff's sale under a subsequent mortgage. The remedy after such sale, if there be any, is upon the fund created by the sale.¹

231. A married woman is bound also by a contract in the nature of a mortgage for purchase money of land conveyed to her, and created by the vendor's reserving in the deed to her a lien upon the land for the security of her note, given for such purchase money.² Her mortgage for purchase money, although invalid by reason of her husband not joining in its execution, has been regarded as a declaration preserving a vendor's lien, or as a declaration of a trust in favor of the vendor.³

232. Waiver of the lien.—A lien reserved by contract, or existing in the vendor by reason of his not having parted with the legal title, having given only a bond or contract of sale, is of course not lost or waived as an implied lien is by accepting other security.⁴ Neither does a change of notes, nor the substitution of the notes of another person, as, for instance, those of a subsequent purchaser, nor the reducing the notes to judgment, affect the lien;⁵ nor does the taking of new notes by an assignee in his own name, and extending the time of payment.⁶ It is not waived by taking under duress depreciated currency in payment of the debt.⁷ The burden of proof is upon the vendee to show a waiver.⁸

The vendor who has an express lien may by his acts or decla-

¹ *Pierce v. Gardner*, 83 Pa. St. 211.

² See *Carpenter v. Mitchell*, 54 Ill. 126; *Weinberg v. Rempe*, 15 W. Va. 829, 831; *Radford v. Carwile*, 13 W. Va. 573.

³ *Morrison v. Brown*, 83 Ill. 562.

⁴ *Lusk v. Hopper*, 3 Bush (Ky.), 179; *Whitehurst v. Yandall*, 7 Bax. (Tenn.) 228; *Sehorn v. McWhirter*, 6 Ib. 313; *Fogg v. Rogers*, 2 Coldw. (Tenn.) 290; *Hines v. Perkins*, 2 Heisk. (Tenn.) 395; *McCaslin v. State*, 44 Ind. 151; *Bozeman v. Ivey*, 49 Ala. 75; *Strickland v. Summerville*, 55 Mo. 164; *Adams v. Cowherd*, 30 Mo. 458; *Lewis v. Pusey*, 8 Bush (Ky.), 615; *Hurley v. Hollyday*, 35 Md. 469; *Schwarz v. Stein*, 29 Md. 112, 119; *Magruder v. Peter*, 11 G. & J. (Md.) 217;

Hatcher v. Hatcher, 1 Rand. (Va.) 53;

Knisely v. Williams, 3 Gratt. (Va.) 265; *Dunlap v. Shanklin*, 10 W. Va. 662; *Price v. Lauve*, 49 Tex. 74.

⁵ *Bozeman v. Ivey*, *supra*; *Bradford v. Harper*, 25 Ala. 337; *Chitwood v. Trimble*, 58 Tenn. 78; *Coles v. Withers*, 33 Gratt. (Va.) 186.

⁶ *Conner v. Banks*, 18 Ala. 42.

⁷ *Ludington v. Gabbert*, 5 W. Va. 330. The vendor was compelled in this case to receive Confederate treasury notes during the Rebellion.

⁸ *Sehorn v. McWhirter*, 8 Bax. (Tenn.) 201; *S. C. 6 Ib. 311*; *Whitehurst v. Yandall*, 7 Bax. (Tenn.) 228.

rations waive it, as, for instance, by inducing another to buy the property as unincumbered; or by permitting and encouraging the administrator of the vendee to sell the property to satisfy the lien, and bidding at the sale. Such bidding at the sale could properly be interpreted by the purchaser as a waiver of the lien, and as an acknowledgment that he was looking solely to the proceeds of the sale, and not to the land itself, for the satisfaction of his claim.¹

The taking of other security is not a waiver of a vendor's lien reserved, as is the case with an implied lien, unless it be shown by direct evidence or by the circumstances of the case that the vendor relied wholly on such other security.²

233. Order of liability of parcels sold.—Purchasers of land, subject to a lien by contract for the payment of purchase money, have the same equities as between themselves as purchasers subject to a formal mortgage. The rule of contribution in the adverse order of sale applies where the same rule applies in the case of mortgages. Simultaneous purchasers should contribute *pro rata*.³

234. Account of vendor in possession.—When a vendor, after giving a bond or contract of sale, remains in possession, and there is delay in making the conveyance beyond the time set for it, the vendee should be credited with a share of the rents and profits received from the use and enjoyment of the property, proportioned to the amount he may have paid on his purchase.⁴

2. Transfer and Enforcement of the Lien.

235. An assignee of a note or bond given for purchase money, by one who has taken a contract of sale or who has taken a conveyance in which a lien upon the land is expressly reserved, like the assignee of a note secured by mortgage, is entitled to the benefit of the security, and may enforce specific performance of the contract of sale or may enforce the lien reserved.⁵ The lien

¹ Butler v. Williams, 5 Heisk. (Tenn.) 241; dell v. Smith, 3 Bradw. (Ill.) 150; Walkenhorst v. Lewis, 24 Kans. 420; Stevens v. Chadwick, 10 Kans. 406, and cases cited; McClintic v. Wise, 25 Gratt. (Va.) 448; Kimbrough v. Curtis, 50 Miss. 117; Dollahite v. Orne, 2 Sm. & M. (Miss.) 590; Tanner v. Hicks, 4 Ib. 294, 299; Roper v. Day, 48 Ala. 509; Sheppard v. Thomas, 26 Ark. 617, 626; Campbell v. Rankin, 28 Ark. 401; Tharpe v. Dunlap,

² Warren v. Branch, 15 W. Va. 21, 22; Daniels v. Moses, 12 S. C. 130.

³ Wilkes v. Smith, 4 Heisk. (Tenn.) 86; Dukes v. Turner, 44 Iowa, 575.

⁴ Grove v. Miles, 71 Ill. 376.

⁵ Wright v. Troutman, 81 Ill. 374; Steinkemeyer v. Gillespie, 82 Ill. 253; Carpenter v. Mitchell, 54 Ill. 126; Bla-

dell v. Smith, 3 Bradw. (Ill.) 150; Walkenhorst v. Lewis, 24 Kans. 420; Stevens v. Chadwick, 10 Kans. 406, and cases cited; McClintic v. Wise, 25 Gratt. (Va.) 448; Kimbrough v. Curtis, 50 Miss. 117; Dollahite v. Orne, 2 Sm. & M. (Miss.) 590; Tanner v. Hicks, 4 Ib. 294, 299; Roper v. Day, 48 Ala. 509; Sheppard v. Thomas, 26 Ark. 617, 626; Campbell v. Rankin, 28 Ark. 401; Tharpe v. Dunlap,

is regarded as incident to the debt.¹ If a vendor who retains the legal title for his security assigns the notes taken for the purchase money, he then holds the legal title as trustee for the holder of the notes, and he cannot properly do anything to defeat the rights of such holder. If he, regardless of the trust, conveys the land to a stranger, who purchases in good faith, the vendor then becomes a trustee of the purchase money which he has realized, for the benefit of the holder of the notes he assigned.² The assignment of a note which upon its face shows that it was given in consideration of the purchase money of land, or expressly reserves a lien upon it, passes the lien to the assignee, who may enforce it.³

One who takes title from the vendor, with knowledge of an outstanding note for the purchase money previously assigned by the vendor, takes subject to the lien of such note,⁴ unless the note was transferred after maturity, or in such manner that it is subject in the hands of the holder to all equities the maker may have against it.⁵

236. Order of payment of several notes.—In case there are several notes or bonds secured in this way, the same equitable rule is applied as to the order of payment of such notes or bonds that is applied when they are secured by a formal mortgage or

4 Heisk. (Tenn.) 674; *Wells v. Morrow*, 38 Ala. 125; *Kelly v. Payne*, 18 Ala. 371; *Roper v. McCook*, 7 Ala. 318; *Hall v. Click*, 5 Ala. 363; *Wolffe v. Nall*, 62 Ala. 24; *Hall v. Mobile & Mont. Ry. Co.* 58 Ala. 10; *Moore v. Anders*, 14 Ark. 628, 634; *Shall v. Biscoe*, 18 Ark. 142; *Rogers v. James*, 33 Ark. 77; *Martin v. O'Bannon*, 35 Ark. 62; *Rakestraw v. Hamilton*, 14 Iowa, 147; *Blair v. Marsh*, 8 Iowa, 144; *Bills v. Mason*, 42 Iowa, 329; *Reynolds v. Morse*, 52 Iowa, 155; *Adams v. Cowherd*, 30 Mo. 458; *Moore v. Lackey*, 53 Miss. 85; *Terry v. George*, 37 Miss. 539; *Robinson v. Harbour*, 42 Miss. 795; *Cleveland v. Martin*, 2 Head (Tenn.), 128.

The cases seem to be uniform upon this point, with the exception of those in Ohio.

By statute in *Arkansas*, 1873, Acts, p. 217, Dig. 1874, § 564, the lien is made assignable by a transfer of the note or other obligation for the debt, provided the lien

is expressed upon the face of the deed of conveyance.

In *California* it is provided that where a buyer of real property gives to the seller a written contract for the payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts, and return the surplus, is not a waiver of the lien. Civil Code, 1872, § 3047.

¹ *Chitwood v. Trimble*, 58 Tenn. 78.

² *Cummings v. Oglesby*, 50 Miss. 153; *Pitta v. Parker*, 44 Miss. 247, 252; *Parker v. Kelly*, 10 S. & M. (Miss.) 184, 191; *Skaggs v. Nelson*, 25 Miss. 88; *Conner v. Banks*, 18 Ala. 42.

³ *Bailey v. Smock*, 61 Mo. 213; *Murray v. Able*, 19 Tex. 213; *Osborne v. Royer*, 1 Lea (Tenn.), 217.

⁴ *Young v. Atkins*, 4 Heisk. (Tenn.) 529.

⁵ *Shinn v. Fredericks*, 56 Ill. 439.

THE VENDOR'S LIEN BY CONTRACT OR RESERVATION. [§§ 237-239.

trust deed ; that which was first assigned carries so much of the lien as is necessary to pay it, unless there be an express agreement otherwise.¹ Such assignee, moreover, is entitled to all the remedies of the vendor to enforce the lien ; and the latter cannot by any act of his deprive the assignee of these remedies.²

237. Statute of limitations. — A lien founded upon contract may be enforced, although the debt be barred by the statute of limitations.³ The relation of a purchaser by title bond to his vendor is similar to that of mortgagor to mortgagee, and his possession is in like manner consistent with his obligation to pay the money secured, and does not become adverse except under circumstances which would make a mortgagor's possession adverse.⁴

238. The obligation first to exhaust the personal remedy, which is a rule of equity adopted by some courts as to liens arising by implication of law, has no application when the lien is created by express contract.⁵

239. Proceedings to enforce such lien. — To enforce a lien for the purchase money reserved by the vendor in his deed, the same proceedings are had as in case of a formal mortgage. The same persons must be made parties. If the vendee has sold any part or the whole of his interest, his grantee must be made a party ; and so must any one who has acquired a lien upon the property through him.⁶ "The rights of the vendee," says Mr. Justice Bradley,⁷ "being the same as those of a mortgagor, they must be extinguished in the same way. They are vested and well defined in the law. They constitute an estate called, it is

¹ *McClintic v. Wise*, 25 Gratt. (Va.) 448.

² *McClintic v. Wise*, *supra*.

³ *Driver v. Hudspeth*, 16 Ala. 348 ; *Bizzell v. Nix*, 60 Ala. 281.

⁴ *Butler v. Douglass*, 1 McCrary, 630 ; *Lewis v. Hawkins*, 33 Wall. 119 ; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570, overruling *Ray v. Goodman*, 1 Sneed (Tenn.), 586 ; *Daniels v. Moses*, 12 S. C. 130.

⁵ *Smith v. Rowland*, 13 Kans. 245 ; *Sparks v. Hess*, 15 Cal. 186, 193, *McCaslin v. State*, 44 Ind. 151.

⁶ §§ 1449, 1541 ; *King v. Young Men's Ass'n*, 1 Woods, 386 ; *Gaston v. White*, 46 Mo. 486.

In Iowa it is provided by statute that

the vendor of real estate, who has given a bond or other writing to convey it, and part or all the purchase money remains unpaid after the day fixed for payment, whether the time is or is not the essence of the contract, may file his petition asking the court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. The vendee in such cases, for the purpose of the foreclosure, is treated as a mortgagor of the property purchased, and his rights may be foreclosed in a similar manner. §§ 3329, 3330, Revision 1873 ; *Dukes v. Turner*, 44 Iowa, 575.

⁷ *King v. Young Men's Ass'n*, 1 Woods, 386.

true, by the name of an equity of redemption; but still an estate which may be conveyed incumbered, and laid under other liens. And the heirs and assigns of the vendee and subsequent holders of liens on the property against him cannot be disregarded or ignored by the original vendor or his assigns, when they desire to extinguish this estate."

Moreover, the vendor, like a mortgagee, has several remedies, and may pursue all of them concurrently; he may bring an action at law to recover the debt, an action of trespass or ejectment for the possession of the land, and a suit in equity to enforce the lien.¹ The vendor seeking to enforce the lien should set forth the terms of the agreement, and if the title is still in him, he should aver his ability and willingness to convey the land according to the terms of sale. An averment also of the amount of purchase money remaining unpaid is necessary to sustain a judgment for a sale of the land to satisfy the amount due upon the contract.² In some states a strict foreclosure of such a lien is allowed.³ But a strict foreclosure is not generally allowed where such a decree is not made in the foreclosure of mortgages.⁴

240. Tender of performance. — It is no defence to an equitable action to enforce a lien under a contract for unpaid purchase money, that the vendor did not tender a deed before bringing suit.⁵ After the time for the performance of the contract has passed, without any offer by either party to perform on that day, there can be no action at law upon it by either, but either may claim a specific performance in equity, making an offer of performance in the bill.⁶ If an action to foreclose the lien be brought, not by the vendor, but by his personal representatives, they should show that they are able and willing to give a deed, or else make the heir or devisee who holds the legal title in trust for the purchaser a party to the suit, so that he will be bound by it.⁷

¹ *Micon v. Ashurst*, 55 Ala. 607.

² *Calvin v. Duncan*, 12 Bush (Ky.), 101. See *Johnston v. Cochrane*, 84 N. C. 446.

³ See § 1541.

⁴ *Fitzhugh v. Maxwell*, 34 Mich. 138.

⁵ *Freeson v. Bissell*, 63 N. Y. 168. See, however, *McCaslin v. State*, 44 Ind. 151; *McKenzie v. Baldrige*, 49 Ala. 564;

Turner v. Lassiter, 27 Ark. 662; *Wakefield v. Johnson*, 26 Ark. 506; *Paschal v. Brandon*, 79 N. C. 504.

⁶ *Bruce v. Tilson*, 25 N. Y. 194; *Stevenson v. Maxwell*, 2 N. Y. 408. And see *McWilliams v. Brookens*, 39 Wis. 334; *Watson v. Bell*, 45 Ala. 452.

⁷ *Thomson v. Smith*, 63 N. Y. 301.

CHAPTER VII.

ABSOLUTE DEED AND AGREEMENT TO RECONVEY.

PART I.

When they constitute a Mortgage, 241-255.

PART II.

When they constitute a Conditional Sale, 256-281.

PART I.

WHEN THEY CONSTITUTE A MORTGAGE.

241. A defeasance is an essential requisite of a mortgage.¹ It may be in the instrument of conveyance, or in a separate writing, or it may exist in parol merely; but it must, nevertheless, exist in some form. The grantor must have a conditional right to have the property restored to him. There must be a valid and binding agreement of some sort on the part of the grantee to yield up the property received by him, when the conditions upon which the conveyance was made have been performed, else there is lacking an element indispensable to a mortgage. The defeasance must be in favor of the grantor himself, and not in favor of any third person. It does not avail anything that the conveyance contains a condition for a reconveyance, if the reconveyance is to be made to some one other than the grantor; whatever else such an instrument may be, it is not a mortgage.²

In equity the rule is different, and the transaction is a mortgage, although the defeasance be to some one other than the grantor; thus, for instance, it may be in the form of an agreement by one person to purchase property at a foreclosure sale, or

¹ Defeasance "is fetched from the French word *defaire*, i. e., to defeat or undo; *infectum reddere quod factum est*." Co. Litt. 237 a.

² *Payne v. Patterson*, 77 Pa. St. 134; *Penn. Life Ins. Co. v. Austin*, 42 Pa. St. 257; *Shaw v. Erskine*, 43 Me. 371; *Warren v. Lovis*, 53 Me. 463; *Treat v. Strick-*

land, 23 Me. 234; *Marvin v. Titsworth*, 10 Wis. 320; *Carr v. Rising*, 62 Ill. 14, 19; *Stephenson v. Thompson*, 13 Ill. 186; *Magnusson v. Johnson*, 73 Ill. 156; *Flagg v. Mann*, 14 Pick. (Mass.) 467, 479; *Bickford v. Daniels*, 2 N. H. 71; *Hill v. Grant*, 46 N. Y. 496; *Low v. Henry*, 9 Cal. 538; *Micou v. Ashurst*, 55 Ala. 607.

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other public sale, and to hold it until the purchase money be repaid by the party who receives the agreement.¹

At law, to constitute a mortgage the conveyance must be made by the mortgagor, and the defeasance by the mortgagee. A bond, therefore, made by the grantee to his grantor, in consideration of the conveyance, and conditioned to support his grantor for life, and in case of neglect to reconvey the land, does not constitute a mortgage. If the deed be made by the person by whom the conditions are to be performed, and he take back a bond for a reconveyance on the performance of the conditions, the transaction may be a mortgage. But in the above case the deed is to the person by whom the conditions are to be performed, and his bond is simply a covenant to reconvey, which may be specifically enforced in equity. There is no conveyance from the supposed mortgagor to the supposed mortgagee. Although such a transaction is not a legal mortgage, the bond may be enforced in equity by a decree for reconveyance.²

242. The usual proviso in a legal mortgage is, that upon the payment of the debt, or performance of the duty named, "then this deed shall be void." But any equivalent expression may be used.³ If it appear from the whole instrument that it was intended to be a security for the payment of a debt or the performance of a duty, it is a mortgage; although there be no express provision that upon the fulfilment of the condition the deed shall be void.⁴ The substance and not the form of the expression is chiefly to be regarded; and an enlarged and liberal view is taken to ascertain and carry into effect the intention of the parties. If there be in the deed itself, or in any separate deed executed at the same time, and constituting with the conveyance one transaction, a provision that the estate shall be reconveyed upon the payment of the debt, such stipulation constitutes a defeasance as much as if the words, "on condition," or "provided however," were used.⁵

¹ See §§ 268, 331; *Weed v. Stevenson*, *Clarke* (N. Y.), 166; *Umfreville v. Keeler*, 1 *Thomp. & C.* (N. Y.) 486; *Barton v. May*, 3 *Sandf.* (N. Y.) Ch. 450; *Sahler v. Signer*, 37 *Barb.* (N. Y.) 329; *S. C.* 44 *Ib.* 606; *McBurney v. Wellman*, 42 *Ib.* 390; *Spicer v. Hunter*, 14 *Abb.* (N. Y.) *Pr.* 4; *Ryan v. Dox*, 34 *N. Y.* 307; *Beigard v. McNeil*, 38 *Ill.* 400; *Stinchfield v. Milliken*, 71 *Me.* 567.

² *Robinson v. Robinson*, 9 *Gray* (Mass.), 447. But see *Chase v. Peck*, 21 *N. Y.* 581, where the grantee in such case pledged the land and the produce of it.

³ *Adams v. Stevens*, 49 *Me.* 362.

⁴ *Steel v. Steel*, 4 *Allen* (Mass.), 417; *Lanfair v. Lanfair*, 18 *Pick.* (Mass.) 299.

⁵ *Taylor v. Weld*, 5 *Mass.* 109; *Scott v. McFarland*, 13 *Mass.* 309; *Austin v. Downer*, 25 *Vt.* 558; *Oldham v. Halley*,

Upon this principle a lease for years, in which the lessor acknowledged the receipt in advance of a sum in full for the rent of the premises during the term, and in which "the lessee covenants, promises, and agrees to reconvey said premises to the lessor, upon the payment of the aforesaid sum and interest thereon," is a mortgage, and the relation of the parties is that of mortgagor and mortgagee.¹ If the lessee receives rents and profits, before the term expires, to the amount of the sum advanced by him, and interest thereon, his estate for years is thereupon defeated, and the lessor is in of his old estate.

The condition of defeasance need not necessarily be inserted in the body of the deed. It has the same effect when added underneath in such a way as to be part of the deed, or when executed separately.² A condition written upon the back of a mortgage and not signed may be held to be a part of the deed, and therefore together with it may constitute a mortgage.³

243. Objections to a separate defeasance. — It is sometimes for the convenience of the parties to make the defeasance by a separate instrument, so that the grantee, in the absence of a record of this instrument, is apparently the absolute owner. This form of mortgage has been used sometimes to the prejudice of the mortgagor, and the courts have at times discouraged the use of it as much as possible. Thus at an early date Lord Chancellor Talbot observed: ⁴ "In the northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way, and to me it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage the practice as much as possible." In another case, Lord Chancellor Hardwicke declared it to be an imposition upon the mortgagor not to insert the provision for reconveyance in the deed itself.⁵

244. At law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage.⁶ Such a deed and agreement to reconvey the estate

² J. J. Marsh. (Ky.) 113. And see *Ferguson v. Miller*, 4 Cal. 97; *Whitcomb v. Sutherland*, 18 Ill. 578. But the instrument is not a mortgage unless equivalent words are used. *Goddard v. Coe*, 55 Me. 385.

¹ *Nugent v. Riley*, 1 Met. (Mass.) 117.

² *Perkins v. Dibble*, 10 Ohio, 433;

Kent v. Allbritain, 5 Miss. (4 How.) 317; *Baldwin v. Jenkins*, 23 Miss. 206.

³ *Whitney v. French*, 25 Vt. 663.

⁴ In *Cotterell v. Purchase*, Cas. Temp. Talbot, 61.

⁵ *Baker v. Wind*, 1 Ves. Sen. 160.

⁶ *Massachusetts*: *Bayley v. Bailey*, 5

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upon payment of a certain sum of money, or upon the performance of some other condition, have always been held to constitute a legal mortgage, if the instruments were of the same date, or were executed and delivered at the same time, and as one transaction.¹ A defeasance made after the record of the deed is sufficient where the deed was made without the knowledge of the grantee, and the obligation to reconvey was made upon his being informed of it.² When the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mortgage.³

The instrument of defeasance must be of as high a nature as the deed itself; and consequently a written agreement to reconvey not under seal, though made at the same time with the deed, does not at law constitute a mortgage.⁴ If not under seal, the agreement

Gray, 405; Judd v. Flint, 4 Ib. 557; Murphy v. Calley, 1 Allen, 107. **New York:** Decker v. Leonard, 6 Lans. 264; Lane v. Shears, 1 Wend. 433; Peterson v. Clark, 15 Johns. 205; Clark v. Henry, 2 Cow. 324; Henry v. Davis, 7 Johns. Ch. 40; Brown v. Dean, 3 Wend. 208; Hall v. Van Cleve, 11 N. Y. Leg. Obs. 281; Weed v. Stevenson, Clarke, 166. **Pennsylvania:** Friedley v. Hamilton, 17 S. & R. 70; Manufacturers' & Mech. Bank v. Bank of Pa. 7 W. & S. 335; Guthrie v. Kahle, 46 Pa. St. 331; Houser v. Lamont, 55 Pa. St. 311; Kerr v. Gilmore, 6 Watts, 405; Colwell v. Woods, 3 Ib. 188; Stoever v. Stoever, 9 S. & R. 434; Johnston v. Gray, 16 Ib. 361; Jaques v. Weeks, 7 Watts 261. **Maine:** Shaw v. Erskine, 43 Me. 371; Warren v. Lovis, 53 Me. 463; Blaney v. Bearce, 2 Me. 132; Mills v. Darling, 43 Me. 565; Clement v. Bennett, 70 Me. 207. **Wisconsin:** Plato v. Roe, 14 Wis. 453; Second Ward Bank v. Upmann, 12 Wis. 499; Knowlton v. Walker, 13 Wis. 264; Brinkman v. Jones, 44 Wis. 498. **Illinois:** Preschbaker v. Feaman, 32 Ill. 475; Ewart v. Walling, 42 Ill. 453. **Missouri:** Sharkey v. Sharkey, 47 Mo. 543; Copeland v. Yoakum, 38 Mo. 349. **North Carolina:** Robinson v. Willoughby, 65 N. C. 520; Mason v. Hearne, 1 Bush. Eq. 88. **Indiana:** Harbison v. Lemon, 3 Blackf. 51; Watkins v. Gregory, 6 Ib. 113; Crassen v. Swoveland, 22 Ind. 427. **Kentucky:** Ogden v. Grant, 6 Dana, 473;

Edrington v. Harper, 3 J. J. Marsh. 353; Honore v. Hutchings, 8 Bush, 687. **Minnesota:** Hill v. Edwards, 11 Minn. 22; Benton v. Nicoll, 24 Minn. 221; Archambau v. Green, 21 Minn. 520. **Other States:** Lanahan v. Sears, 102 U. S. 318; Dow v. Chamberlin, 5 McLean, 281; Hammonds v. Hopkins, 3 Yerg. (Tenn.) 525; Baxter v. Dear, 24 Tex. 17; Caruthers v. Hunt, 18 Iowa, 576; Enos v. Sutherland, 11 Mich. 538; Marshall v. Stewart, 17 Ohio, 356; Reynolds v. Scott, Brayt. (Vt.) 75; Clark v. Lyon, 46 Ga. 202; Walker v. Tiffin Mining Co. 2 Col. 89; Freeman v. Baldwin, 13 Ala. 246; Sims v. Gaines, 64 Ala. 392.

¹ Nugent v. Riley, 1 Met. (Mass.) 117; Erskine v. Townsend, 2 Mass. 493; Taylor v. Weld, 5 Mass. 109; Scott v. McFarland, 13 Mass. 308; Newhall v. Burt, 7 Pick. (Mass.) 157; Stocking v. Fairchild, 5 Ib. 181; Eaton v. Whiting, 3 Ib. 484; Lanfair v. Lanfair, 18 Ib. 299.

² Harrison v. Phillips Academy, 12 Mass. 456.

³ Wilson v. Shoenberger, 31 Pa. St. 295; Reitenbaugh v. Ludwick, 31 Pa. St. 131.

⁴ Murphy v. Calley, 1 Allen (Mass.), 107; Kelleran v. Brown, 4 Mass. 443; Flint v. Sheldon, 13 Mass. 443; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Flagg v. Mann, 14 Ib. 467; Scituate v. Hanover, 16 Ib. 222; Jewett v. Bailey, 5 Me. 87; French v. Sturdivant, 8 Me. 246; Warren

will constitute a mortgage only in equity.¹ The defeasance must also be absolute. A contract which gives the grantee the option to reconvey, or pay a sum of money, is not a defeasance, which in connection with the deed will constitute a mortgage. The fee is absolute in the grantee if he so elect.²

245. At law the deed and defeasance must be part of the same transaction, and must take effect at the same time.³ A subsequent defeasance cannot be allowed to affect the prior conveyance. The transaction must be a mortgage at its inception, and cannot become so afterwards. The defeasance must be such that it may be considered as if it were annexed to, or inserted in, the same deed, and construed as containing the condition upon the performance of which the estate may be defeated.⁴

If at the time of executing an absolute deed the parties verbally agree that a defeasance shall be executed subsequently, on request, such defeasance, when executed, will relate back to the deed, and make it a mortgage.⁵

It is not necessary that the deed and bond of defeasance should both bear the same date.⁶ If these have once been given, and a reconveyance made in accordance with the terms of the bond, and subsequently the premises are reconveyed to the obligor, under an agreement that the same bond shall continue in force for another reconveyance, this amounts to a redelivery of the bond, and makes the transaction a mortgage.⁷ Where the defeasance is of a different date from the deed, parol evidence is admissible to prove that they were delivered at the same time, and are part of the same transaction.⁸ It is not necessary that the deed and defeasance should in terms refer to each other. Their connection may be established by parol evidence.⁹

246. The defeasance must be executed and delivered at the same time with the deed to which it refers. Although it is not material that the instruments should bear the same date, it is

v. Lovis, 53 Me. 463. See, however, *Harrison v. Phillips Academy*, 12 Mass. 456; *Runlet v. Otis*, 2 N. H. 167.

¹ *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Eaton v. Green*, 22 Ib. 526; *Cutler v. Dickinson*, 8 Ib. 386; *Kelleran v. Brown*, 4 Mass. 443.

² *Fuller v. Pratt*, 10 Me. 197.

³ *Bennock v. Whipple*, 12 Me. 346; *McLaughlin v. Shepherd*, 32 Me. 143.

⁴ *Murphy v. Calley*, 1 Allen (Mass.), 107, and cases cited.

⁵ *Lovering v. Fogg*, 18 Pick. (Mass.) 540; and see *Scott v. Henry*, 13 Ark. 112. *Contra*, *Lund v. Lund*, 1 N. H. 39.

⁶ *Harrison v. Phillips Academy*, 12 Mass. 456; *Newhall v. Burt*, 7 Pick. (Mass.) 157.

⁷ *McIntier v. Shaw*, 6 Allen (Mass.), 83. See *Judd v. Flint*, 4 Gray (Mass.), 557.

⁸ *Brown v. Holyoke*, 53 Me. 9.

⁹ *Preschbaker v. Feaman*, 32 Ill. 475.

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essential that they be delivered at the same time.¹ In equity, however, it is immaterial that the deeds and the agreement to reconvey be executed at different times; and, as will be noticed elsewhere, it is immaterial that there be any bond or agreement to reconvey, parol evidence being sufficient to prove the transaction to be a mortgage.² When made subsequently, it must be based on a sufficient consideration, unless it be professedly executed in explanation of the intention of the parties at the time of the conveyance, and of the true character of the instrument. A mere voluntary agreement to reconvey cannot be enforced.³

247. If the agreement to reconvey be delivered as an *escrow*, to be delivered to the obligee upon the repayment of the money within a certain time, it is not executed and delivered at the same time with the deed, so as to constitute part of the same transaction, and therefore the transaction is not a mortgage.⁴ A conveyance absolute on its face was made to one who advanced money to the grantor, and at the same time executed an agreement to reconvey the land, upon repayment of the money advanced, within thirty days; and both instruments were placed in the hands of a third person, with instructions, that if repayment was not so made to deliver both instruments to the grantee. The money not being repaid, both instruments, after the default, were delivered to the grantee, the grantor so directing. It was held that the deed, on its delivery to the grantee, conveyed the land to him absolutely, and was not a mortgage. The maxim, "Once a mortgage, always a mortgage," was declared inapplicable to the case, because the conveyance never was a mortgage. The transaction was to the effect, that if the advance was repaid in thirty days it should be a loan; but if not repaid in that time, it should be the consideration for an absolute conveyance of the land in question.⁵

¹ See § 277; *Kelleran v. Brown*, 4 Mass. 443; *Kelly v. Thompson*, 7 Watts (Pa.), 401; *Haines v. Thomson*, 70 Pa. St. 434; *Cotton v. McKee*, 68 Me. 486.

² See chapter viii; *Walker v. Tiffin Mining Co.* 2 Col. 89; *Scott v. Henry*, 13 Ark. 112; *Brinkman v. Jones*, 44 Wis. 498.

³ *Vasser v. Vasser*, 23 Miss. 378.

⁴ *Bodwell v. Webster*, 13 Pick. (Mass.) 411. The case of *Carey v. Rawson*, 8 Mass. 159, in apparent conflict with the

above, is explained on the ground that the deed in that case was not considered as an *escrow*, but as a deed taking effect presently, without the performance of the conditions; but in *Bodwell v. Webster*, *supra*, the bond having been delivered in *escrow*, and the conditions never being performed, it was never delivered to the obligee. See *Exton v. Scott*, 6 Sim. 31.

⁵ *Glendenning v. Johnston*, 33 Wis. 347. See *Leggett v. Edwards*, Hopk. (N. Y.) 530; *Henley v. Hotaling*, 41 Cal. 22, 28.

248. Parol evidence is admissible to connect the deed and defeasance, — to show that they are parts of the same transaction, and that together they were intended to constitute a mortgage.¹ Such proof is introduced not to contradict or vary the writings, but to show that they are really one arrangement, and were agreed upon at the same time.² It is also admissible to show that the defeasance has been lost or destroyed by fraud or mistake.³

The legal effect of the deed and bond to reconvey, when the instruments are not ambiguous, is a matter of law for the court.⁴

When the conveyance and the agreement to reconvey on payment of the purchase money are on their face of even date, the transaction is necessarily a mortgage, and parol evidence of a different understanding by the parties will not be received to convert it into a conditional sale.⁵ When the two instruments are of different dates, such evidence is admissible. If the agreement recite that the deed was delivered on the same day with the agreement, although the dates are different, *prima facie* the transaction is a mortgage; but evidence is admissible to account for the discrepancy between the dates and the execution of the paper; and such evidence may show that the deed was executed upon a sale, and not as security.⁶ If it be acknowledged or proved that it was in the beginning a sale, the burden of proof is upon the grantor to establish a change in its character.⁷

249. If the defeasance express a condition that is illegal, or contrary to public policy, as where the grantee stipulated that if he should not procure two witnesses to testify to a certain state of facts the deed should be null and void, the transaction will not be held to constitute a mortgage, because the legal estate having once vested in the grantee, it cannot be divested by his failure to perform the illegal stipulation, but the deed to him becomes and remains absolute.⁸

250. When it is once established that the separate instru-

¹ *Gay v. Hamilton*, 33 Cal. 686; *Preschaker v. Feaman*, 32 Ill. 475; *Tillson v. Moulton*, 23 Ill. 648; *Kelly v. Thompson*, 7 Watts (Pa.), 401.

² *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, 138; *Wilson v. Shoenberger*, Ib. 295.

³ *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594.

⁴ *Keith v. Catchings*, 64 Ga. 773.

⁵ *Kerr v. Gilmore*, 6 Watts (Pa.), 405;

Brown v. Nickle, 6 Pa. St. 390. In the latter case it was remarked that *Kerr v. Gilmore* "pushed the doctrine to its utmost verge."

⁶ *Haines v. Thomson*, 70 Pa. St. 434.

See *Baisch v. Oakeley*, 68 Pa. St. 92;

Gubbings v. Harper, 7 Phil. (Pa.) 276.

⁷ *Haines v. Thomson*, *supra*.

⁸ *Patterson v. Donner*, 48 Cal. 369.

ment is a defeasance, the conveyance assumes the character of a mortgage with the inseparable incident of redemption, which no agreement of the parties that the estate shall be absolute, if the money be not paid at the day fixed, can waive. The intent of the parties contrary to the rules of law avails nothing. The right of redemption, therefore, cannot be affected by receipts and accounts given by the grantor to the grantee, mentioning the deed as an absolute conveyance.¹ In all cases, a condition express or implied that the deed shall be void if payment be made at the day, is in equity regarded as substantially performed by a subsequent payment, and thereupon reconveyance may be enforced.²

Neither can the right of redemption be restricted to the mortgagee personally, as such a restriction is inconsistent with the nature of a mortgage, and void.³

A deed absolute in form; with an agreement under seal made by the grantee at the same time, promising to reconvey within a specified time, upon repayment of the sum paid for the deed, with interest, constitutes a mortgage, although it is stipulated, that if the grantor fails to repay the sum within the time specified, the agreement shall be void and the deed absolute, "with no right of redemption." This latter provision is, in fact, regarded as quite decisive of the understanding of the parties that the transaction

¹ Bayley v. Bailey 5 Gray (Mass.), 505.

² Massachusetts: McIntier v. Shaw, 6 Allen, 83; Parks v. Hall, 2 Pick. 206, 211; Steel v. Steel, 4 Allen, 417. New Jersey: Sweet v. Parker, 22 N. J. Eq. 453; Judge v. Reese, 24 N. J. Eq. 387; De Camp v. Crane, 19 N. J. Eq. 166; Vanderhaise v. Hugues, 13 N. J. Eq. 244, 410. Iowa: Wilson v. Patrick, 34 Iowa, 362; Holliday v. Arthur, 25 Iowa, 19; Richardson v. Barrick, 16 Iowa, 407; Scott v. Mewhirter, 49 Iowa, 487; Brush v. Peterson, 54 Iowa, 243. Pennsylvania: Sweetzer's App. 71 Pa. St. 264; Danzeisen's App. 73 Ib. 65; Harper's App. 64 Ib. 315; Odenbaugh v. Bradford, 67 Pa. St. 96; Halo v. Schick, 57 Pa. St. 319. Illinois: Hunter v. Hatch, 45 Ill. 178; Ewart v. Walling, 42 Ill. 453; Reigard v. McNeil, 38 Ill. 400; Tillson v. Moulton, 23 Ill. 648; Clark v. Finlon, 90 Ill. 245. Vermont: Wright v. Bates, 13 Vt. 341; Mott v. Harrington, 12 Vt. 199.

Missouri: Davis v. Clay, 2 Mo. 161; Wilson v. Drumrite, 21 Mo. 325. Wisconsin: Yates v. Yates, 21 Wis. 473; Rogan v. Walker, 1 Wis. 527. Ohio: Cotterell v. Long, 20 Ohio, 464; Miami Exporting Co. v. Bank of U. S. Wright, 249; Tennessee: Bennett v. Union Bank, 5 Humph. 612; McGan v. Marshall, 7 Ib. 121; Webb v. Patterson, 7 Ib. 431; Hinson v. Partee, 11 Ib. 587. Other States: Clark v. Lyon, 46 Ga. 202; Moore v. Wade, 8 Kans. 380; Baugher v. Merryman, 32 Md. 185; Anthony v. Anthony, 23 Ark. 479; Church v. Cole, 36 Ind. 34; Howe v. Russell, 36 Me. 115; Nichols v. Reynolds, 1 R. I. 30; Vasser v. Vasser, 23 Miss. 378; Somersworth Sav. Bank v. Roberts, 38 N. H. 22; Phoenix v. Gardner, 13 Minn. 430; Bingham v. Thompson, 4 Nev. 224; Endel v. Walls, 16 Fla. 786; Lindsay v. Matthews, 17 Fla. 575.

³ Johnston v. Gray, 16 S. & R. (Pa.) 361; and see McClurkan v. Thompson, 69 Pa. St. 305.

was a conveyance of the estate, defeasible upon the payment of money.¹

251. The mortgagor is not allowed to renounce beforehand his privilege of redemption. Generally, every one may renounce any privilege or surrender any right he has ; but an exception is made in favor of debtors who have mortgaged their property, for the reason that their necessities often drive them to make ruinous concessions in order to raise money. When one borrows money upon the security of his property he is not allowed by any form of words to preclude himself from redeeming.² He cannot agree that upon default his mortgage shall become an absolute conveyance. A subsequent agreement, that what was originally a mortgage shall be regarded as an absolute conveyance, is open to the same objection, and will not be sustained unless fairly made, and no undue advantage is taken by the creditor.³ The burden is therefore upon the creditor to show that the right of redemption was given up deliberately, and for an adequate consideration.⁴ Generally, when the consideration of the conveyance was an existing debt, a provision that if the amount required for a repurchase be not paid at the time specified, the agreement for repurchase shall be null and void, or that there shall be no redemption afterwards, is looked upon as a device to deprive the debtor of his right of redemption, and is therefore disregarded.⁵

252. Cancellation of defeasance.— A deed of defeasance, made at the same time with an absolute deed, may afterwards, upon sufficient consideration, be cancelled, so as to give an absolute title to the mortgagee, if no rights of third parties have intervened ; but no agreement can be made at the time of creating the mortgage that will entitle the mortgagee at his election to hold the estate free from condition, and not subject to redemption.⁶ Thus, if it be agreed that the grantee, whenever he shall be compelled to pay certain liabilities against which the deed was

¹ *Murphy v. Calley*, 1 Allen (Mass.), 107, and cases cited.

² § 1045; *Clark v. Henry*, 3 Cow. (N. Y.) 324; *Rankin v. Mortimere*, 7 Watts (Pa.), 372; *Cherry v. Bowen*, 4 Sneed (Tenn.), 415; *Pierce v. Robinson*, 13 Cal. 116, 125; *Robinson v. Farrelly*, 16 Ala. 472; *Clark v. Condit*, 18 N. J. Eq. 358; *Youle v. Richards*, 1 N. J. Eq. (Sax.) 534.

³ *Henry v. Davis*, 7 Johns. (N. Y.) Ch. 40; *Wright v. Bates*, 13 Vt. 341; *Mills v. Mills*, 26 Conn. 213.

⁴ *Villa v. Rodriguez*, 12 Wall. 323; *Locke v. Palmer*, 26 Ala. 312; *Brown v. Gaffney*, 28 Ill. 149; *Baughner v. Merryman*, 32 Md. 185; *Shaw v. Walbridge*, 33 Ohio St. 1.

⁵ *Enos v. Sutherland*, 11 Mich. 538; *Batty v. Snook*, 5 Mich. 231.

⁶ *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Harrison v. Phillips Academy*, 12 Mass. 456.

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given as security, may then take immediate possession of the estates, according to certain estimated values, to such an extent as shall be equal to the debt or liability so paid by him, this stipulation does not change the nature of the transaction, which must still be treated as a mortgage.¹

If the original bond of defeasance, which was given at the time of taking the deed, be surrendered and destroyed at the expiration of the time limited therein, and a new bond be given upon a consideration partly new, by which the grantee agrees to reconvey the premises upon the payment, within an additional time, of a larger sum, the grantor thereby surrenders his title as mortgagor, and the grantee becomes the owner in fee of the land.² If the original bond be given up, and a new bond to a third person be executed in place of it, the transaction loses its character of a mortgage.

When once the defeasance has been delivered up for a valid consideration to be cancelled, and the original transaction is thus confirmed as a sale, and is treated as such by the grantor or his heirs, it cannot afterwards be treated as a mortgage and foreclosed.³

But in states where a mortgage, whatever its form may be, creates merely a lien in the mortgagee while the legal title remains in the mortgagor, the surrender or cancellation of the defeasance is insufficient to restore the title to the mortgagee.⁴ And especially if the contract for reconveyance be surrendered upon the express agreement of the grantee to reconvey upon the grantor's paying a certain sum then found to be due, the surrender will not prevent the mortgagor's redeeming upon the terms agreed upon.⁵

253. Recording of separate defeasance. — In several states it is provided by statute that a bond of defeasance shall not defeat an absolute estate against any one other than the maker, his heirs, devisees, or persons having actual notice thereof, unless it be recorded.⁶ If the bond be not recorded a person having no knowledge of it may of course purchase the property, or attach it

¹ *Waters v. Randall*, 6 Met. (Mass.) 479. ⁷⁰ Ill. 457; *Rice v. Rice*, 4 Pick. (Mass.) 349, 350, note.

² *Falis v. Conway Mut. Fire Ins. Co.* 7 Allen (Mass.), 46; *Maxfield v. Patchen*, 29 Ill. 39, 42; *Carpenter v. Carpenter*,

³ *Shubert v. Stanley*, 52 Ind. 46.

⁴ *Brinkman v. Jones*, 44 Wis. 498.

⁵ *Clark v. Finlon*, 90 Ill. 245.

⁶ See §§ 482-526, 548.

as belonging absolutely to the grantee; but if he has actual notice of the bond as constituting a part of the transaction of the conveyance, any right he acquires in the property is subject to the mortgage created by the bond.¹ If the defeasance recorded be an instrument not entitled to be recorded, as, for instance, when it has not been acknowledged, the record of it is not constructive notice, and a purchaser from the grantee without notice of the defeasance will acquire a good title notwithstanding such recorded defeasance.² The recording of the defeasance is not necessary in order to give it full effect as between the parties themselves,³ but only as against other persons; and as against them it is not necessary when the conveyance on its face does not purport to be absolute.⁴ Under such statutes it is held that a separate defeasance not recorded cannot be introduced in evidence to show that an absolute conveyance is a mortgage, for the court cannot assume or know that it ever would be recorded; but it will have that effect if recorded at any time before it is introduced in evidence.⁵ Notice of the existence of a bond of defeasance is not to be inferred from the fact alone that the grantor continues in possession after the deed given by him has been recorded.⁶ To constitute notice of a legal mortgage as distinguished from one that is equitable merely, a purchaser must have reason to believe that the conveyance and bond were executed and delivered so as to form one transaction.⁷

There is a difference of opinion as to the meaning of the words "actual notice," in these statutes. On the one hand a strict construction is given them, making actual knowledge of the defeasance necessary to charge third persons with actual notice. Thus, for instance, actual notice is not to be implied from knowledge that the grantor has remained in open and visible possession after his conveyance of the land by absolute deed.⁸ But on the

¹ See §§ 482-526, 548; *Newhall v. Pierce*, 5 Pick. (Mass.) 450; *Newhall v. Burt*, 7 Pick. (Mass.) 157; *Furrington v. Pierce*, 38 Me. 447; *Friedley v. Hamilton*, 17 S. & R. (Pa.) 70; *Manufacturers' & Mechanics' Bank v. Bank of Pa.* 7 W. & S. (Pa.) 335; *Corpman v. Baccastow*, 84 Pa. St. 363; *Catlin v. Bennett*, 47 Tex. 165; *Tufts v. Tapley*, 129 Mass. 380.

² *Cogan v. Cook*, 22 Minn. 137.

³ *Bayley v. Bailey*, 5 Gray (Mass.), 505, 510; *Jackson v. Ford*, 40 Me. 381.

⁴ *Russell v. Waite*, Walk. (Mich.) Ch. 31.

⁵ *Tomlinson v. Monmouth Mut. F. Ins. Co.* 47 Me. 232; *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

⁶ *Newhall v. Pierce*, 5 Pick. (Mass.) 450.

⁷ *Newhall v. Burt*, 7 Pick. (Mass.) 157.

⁸ § 579; *Story's Eq. Jur.* § 399; *Lamb v. Pierce*, 113 Mass. 72; *White v. Foster*, 102 Mass. 375; *Crassen v. Swoveland*, 22 Ind. 427, 434.

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other hand it is held that knowledge of such possession on the part of a subsequent purchaser is evidence to be considered upon the question of actual notice of the grantor's rights. "Actual notice" is distinguished from mere "notice" by holding that no constructive knowledge can be imputed to the purchaser as a ground of notice; for example, actual, open, and visible occupation, whether known to the purchaser or not, would not impute actual notice to the purchaser of the rights of the occupant, but would be evidence of such notice if the occupation were known to the purchaser. The rule is stated to be, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase.¹

These provisions do not require that every conveyance of land accompanied by a conditional agreement shall be recorded as a mortgage; but only when the agreement is analogous to that of the usual condition in a mortgage, as, for instance, an agreement providing that if certain acts are performed, the deed shall not operate, but shall become void.²

254. Whether the record furnishes notice of the nature of the transaction depends upon attendant circumstances. Although the instruments may in fact constitute a mortgage as between the parties, yet, if they do not of themselves show that they are parts of one transaction, but were executed on different days, and each is complete in itself, and independent of the other, the record of them is not notice to a subsequent purchaser that they constitute a mortgage. He is bound only by what appears of record, and he has a right to assume, from the record in such case, that there was an absolute sale merely, with a subsequent agreement for repurchase.³ It is usual, however, to make such reference in the bond to the debt secured, or to the deed or conveyance, that it is apparent from the construction of these instruments alone that the transaction was a mortgage, and a purchaser is then bound accordingly.⁴ In 1736, land was conveyed by an absolute deed, and the grantee, in 1742, conveyed the

¹ *Brinkman v. Jones*, 44 Wis. 498, 47 Mo. 304; *Porter v. Sevey*, 43 Me. 519, per Taylor, J.; and see *Mugrove v. Bonser*, 5 Oregon, 313; *Wilson v. Miller*, 16 Iowa, 111; *Maupin v. Emmons*,

² *Macanlay v. Porter*, 71 N. Y. 173.

³ *Weide v. Gehl*, 21 Minn. 449.

⁴ *Hill v. Edwards*, 11 Minn. 22.

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land by a deed in which it was recited that his grantee had purchased the first grantor's right of redemption. This recital, however, was held to be no ground for presuming that the first deed was a mortgage.¹

255. Notice by possession.² — When the mortgage is effected by an absolute deed accompanied by a separate defeasance, possession and actual occupation by the mortgagor is sufficient to put a purchaser from the grantee upon inquiry, and to charge him with notice of the mortgagor's rights.³ Such possession is notice to all the world of any claim which he who is in possession has upon the land. It is not to be supposed that any man who wishes in good faith to purchase the land will do so without knowing what are the claims of a person who is in open possession. He is chargeable, therefore, with knowledge of such claims.⁴ A conveyance of the premises by the mortgagee to a third person amounts to an assignment of the mortgage only if the grantee has notice in any way of the defeasance.⁵

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WHEN THEY CONSTITUTE A CONDITIONAL SALE.

256. The advantage of considering the transaction a mortgage is not all on the side of the grantor; and as between a mortgage and a conditional sale, the latter may be the more for his benefit. In this way he avoids the continuance, or the incurring, of a debt. If at the close of the time limited for reconveyance he is not in condition to perform the contract, or does not desire to, there is no obligation resting upon him to do so. It is his option to repurchase or not. But if the transaction be a mortgage in the beginning it is always a mortgage. The grantor is not allowed to speculate upon the chances attending the transaction, and upon finding that the property is not worth the amount of the debt to call a mortgage a conditional sale; or, on the other hand, when he finds that the property has increased in value, and that there would be an advantage in redeeming, to call what was actually a conditional sale a mortgage. The character of the transaction is fixed at its inception.

¹ *King v. Little*, 1 Cush. (Mass.) 436.

² See §§ 600, 601.

³ *Daubenspeck v. Platt*, 22 Cal. 330.

⁴ *Pritchard v. Brown*, 4 N. H. 397.

⁵ *Halsey v. Martin*, 22 Cal. 645.

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257. Cases involving the distinction between mortgages and conditional sales are usually brought before courts of equity for adjudication. At law, as has already been noticed, an agreement for a reconveyance, to constitute a defeasance and make the transaction a mortgage, must be executed at the same time with the conveyance, and as a part of the same transaction, and must be under seal; while in equity any evidence, whether it be in writing or merely parol, which clearly shows that the conveyance was in fact intended only as a security, will make the transaction a mortgage; and if there be a written agreement for reconveyance, it matters not how informal it may be, or when it was executed.¹ It follows, therefore, that a court of equity will often pronounce that to be an equitable mortgage which at law would be considered a conditional sale. A court of equity is not concluded by the form of the transaction whether this seems to indicate a mortgage or a conditional sale, but will have regard to the actual facts.² "A court of law," says Judge Story,³ "may be compelled, in many cases, to say that there is no mortgage, when a court of equity would not hesitate a moment in pronouncing that there is an equitable mortgage."

258. Intention the criterion. — Whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case.⁴ "A glance at the numerous adjudications in controversies of this kind will suffice to show that each case must be decided in view of the peculiar circumstances which belong to it and mark its character, and that the only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction."⁵ The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract.⁶

While in all doubtful cases the courts will construe the contract to be a mortgage rather than a conditional sale,⁷ yet, when a con-

¹ *Flagg v. Mann*, 2 Sumn. 486; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Pearson v. Seay*, 38 Ala. 643.

² *McNamara v. Culver*, 22 Kans. 661.

³ In *Flagg v. Mann*, *supra*.

⁴ See § 325; *Hughes v. Sheaff*, 19 Iowa, 335; *Edrington v. Harper*, 3 J. J.

Marsh. (Ky.) 353, 354; *Davis v. Stonestreet*, 4 Ind. 101; *Heath v. Williams*, 30 Ind. 495.

⁵ *Cornell v. Hall*, 22 Mich. 377, 383, per *Graves, J.*

⁶ *Smith v. Crosby*, 47 Wis. 160.

⁷ § 279; *King v. Newman*, 2 Munf.

ditional sale is clearly established, it will be enforced.¹ If the relation of debtor and creditor in any given case existed in the beginning, and the debt still subsists as to the consideration of the conveyance, the transaction will be treated as a mortgage. If, however, the debt was extinguished by a fair agreement, and the grantor has the privilege merely of refunding if he pleases, by a given time, and thereby entitle himself to a reconveyance, the transaction is a conditional sale, and the equity of redemption does not continue.² The grantor who neglects to perform the condition on which the privilege of repurchasing depends will not be relieved.³

259. Conway v. Alexander.— This matter was carefully considered by the Supreme Court of the United States in *Conway v. Alexander*.⁴ Land had been conveyed to a third person in trust, to reconvey to the grantor if he should repay the purchase money before a day named, and, if not, then to convey to the purchaser. The grantor brought a bill to redeem, whereupon the court held that, in the absence of a bond, note, or other evidence of indebtedness, the transaction must be regarded as a conditional sale; and as the complainant had not tendered the money at the time provided, that the bill should be dismissed. Chief Justice Mar-

(Va.) 40; *Robertson v. Campbell*, 2 Call (Va.), 421; *Sears v. Dixon*, 33 Cal. 326; *Skinner v. Miller*, 5 Litt. (Ky.) 84, 86; *Poindexter v. McCannon*, 1 Dev. (N. C.) Eq. 377; *Conway v. Alexander*, 7 Cranch, 218.

¹ *Davis v. Thomas*, 1 Russ. & M. 506; *Goodman v. Grierson*, 2 Ball & B. 274, 278; *Pennington v. Hanby*, 4 Munf. (Va.) 140; *Bloodgood v. Zeily*, 2 Caines (N. Y.) Cas. 124.

² *Robinson v. Cropsey*, 2 Edw. (N. Y.) 138; S. C. 6 Paige (N. Y.), 480; *Holmes v. Grant*, 8 Ib. 243; *Brown v. Dewey*, 2 Barb. (N. Y.) 28; S. C. 1 Sandf. (N. Y.) Ch. 56.

³ *Hughes v. Sheaff*, 19 Iowa, 335; *Saxton v. Hitchcock*, 47 Barb. (N. Y.) 220; *Woodworth v. Morris*, 56 Ib. 97; *Whitney v. Townsend*, 2 Lans. (N. Y.) 249.

⁴ 7 Cranch, 218. "In this case," said Chief Justice Marshall, "the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a

circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a preëxisting debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him."

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shall, delivering the opinion of the court, said: "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day; or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the courts of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale; and as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale."

260. In order to convert what appears to be a conditional sale into a mortgage, the evidence should be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage. It may well be that a person buys lands in satisfaction of a precedent debt, or for a consideration then paid, and at the same time contracts to reconvey the lands upon the payment of a certain sum, and there is no intention on the part of either party that the transaction should be, in effect, a mortgage. The covenant to reconvey is not necessarily either at law or in equity a defeasance. It is one fact which may, in connection with other facts, go to show that the parties really intended the deed to operate as a mortgage; but standing alone it does not produce that result. Something more is necessary; and an indispensable thing is a debt by the grantor to the grantee for which the conveyance is security.¹

¹ *Henley v. Hotaling*, 41 Cal. 22; *Haynie v. Robertson*, 58 Ala. 37.

"The owner of the lands may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon

specified terms; and if such appears to be the intention of the parties, it is not the duty of the court to attribute to them a different intention. Such a contract is not opposed to public policy, nor is it in any sense illegal; and courts would de-

261. A contract of repurchase may upon its face show that the parties really intended an absolute sale, with the privilege to the vendor of repurchasing on the terms named. It will be so interpreted when the provisions of the contract are inconsistent with the idea that a mortgage to secure an indebtedness was intended.¹ The agreement upon its face may be either an agreement to reconvey merely, or may amount with the deed to a mortgage,² in which case a resort to evidence outside of these instruments may be necessary to determine the character of the transaction.³ An express provision that the contract for reconveyance should be regarded only as a contract to reconvey, and not as an acknowledgment that the deed was intended as a mortgage, should be given effect to if consistent with the whole transaction, as declaring the intention of the parties that it should not create a mortgage.⁴ If an instrument declares that it is a conditional deed and not a mortgage, and is to be absolute upon the non-payment of a sum mentioned at a time specified, it is to be construed as a conditional deed and not a mortgage.⁵ Sometimes the terms of the agreement for reconveyance may not be conclusive that a sale was intended with the privilege of repurchasing, but may be so inconsistent with any other theory that very little further evidence to the same effect will lead to this determination.⁶ On the other hand, an absolute deed of land, which contains a recital that it was executed to secure the payment of a loan of money, shows upon its face that it is a mortgage.⁷

262. A purchaser is entitled to have an actual sale enforced. When there is, in fact, a sale instead of a mortgage, but the grantor subsequently claims the transaction to be a mortgage, the grantee may maintain a bill in equity to have it decreed a sale.⁸ A purchaser is as much entitled to have his rights pro-

part from the line of their duties should they, in disregard of the real intention of the parties, declare it to be a mortgage." Per Chief Justice Rhodes, in *Henley v. Hotaling*, 41 Cal. 22.

¹ *Hanford v. Blessing*, 80 Ill. 188; *Smith v. Crosby*, 47 Wis. 160.

² *Hickox v. Lowe*, 10 Cal. 197. In this case a debtor conveyed to his creditor, and took back an agreement to reconvey whenever the grantor should repay the consideration, with a stipulated sum per month for the use of the money, with a provision that if the net rents per month

should exceed that sum, the grantee should apply them to the payment of the consideration.

³ *Rich v. Doane*, 35 Vt. 125; *Bishop v. Williams*, 18 Ill. 101; *Snyder v. Griswold*, 37 Ill. 216; *Parish v. Gates*, 29 Ala. 254; *McCarron v. Cassidy*, 18 Ark. 34; *McNamara v. Culver*, 22 Kans. 661, 670.

⁴ *Ford v. Irwin*, 18 Cal. 117.

⁵ *Burnside v. Terry*, 45 Ga. 621.

⁶ *Hanford v. Blessing*, 80 Ill. 188.

⁷ *Montgomery v. Chadwick*, 7 Iowa, 114.

⁸ *Rich v. Doane*, 35 Vt. 125.

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tected as is a mortgagor. A sale in connection with an agreement for repurchase comes very near in form and substance to a mortgage, but the rights of the parties under these instruments are very different.¹ While a mortgage may be redeemed at any time before the right is cut off by foreclosure, there can be no redemption under a conditional sale after the day appointed. But this is the contract of the parties, and either one of them is entitled to have it enforced according to its terms.² The option to repurchase may be a personal privilege which cannot be enforced in case of the death of the obligee during the continuance of the option.³

263. The character of the transaction is fixed at the inception of it, and is what the intention of the parties makes it. The form of the transaction and the circumstances attending it are the means of finding out the intention. If it was a mortgage in the beginning it remains so; and if it was a conditional sale at the start no lapse of time will make a mortgage of it. The recording of the conveyance as a mortgage, if it was intended as a sale with a right of repurchase at the option of the grantor, does not make it a mortgage. If not a security in the beginning, but an absolute sale or a conditional sale, no subsequent event, short of a new agreement between the parties, can convert it into a mortgage.⁴

264. If intended by the parties as a security for money, an absolute conveyance is in equity a mortgage. Different instruments executed at the same time, constituting one transaction, are to be read together, in order to ascertain the intent of the parties. Of course it is entirely competent for persons capable of acting for themselves to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price, and at a specified time; and the inquiry in every case therefore

¹ *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. (Mass.) 467.

² *Joy v. Birch*, 4 Cl. & F. 57; *Pegg v. Wisden*, 16 Beav. 239; *Barrell v. Sabine*, 1 Vern. 268; *St. John v. Wareham*, cited in *Thornborough v. Baker*, 3 Swanst. 628, 631; *Ensworth v. Griffiths*, 1 Bro. P. C. 149; *Perry v. Meddowcroft*, 4 Beav. 197; *Holmes v. Grant*, 8 Paige (N. Y.), 243; *Brown v. Dewey*, 2 Barb. (N. Y.) 28; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Trucks v. Lindsey*, 18 Iowa, 504; *Moss v. Green*, 10 Leigh (Va.), 251; *Ran-*

sone v. Frayser, Ib. 592; *Hanford v. Blessing*, 80 Ill. 188; *Pitts v. Cable*, 44 Ill. 103; *Carr v. Rising*, 62 Ill. 14; *Dwen v. Blake*, 44 Ill. 135; *Shays v. Norton*, 48 Ill. 100; *Cornell v. Hall*, 22 Mich. 377; *People v. Irwin*, 14 Cal. 428; 18 Ib. 117; *Henley v. Hotaling*, 41 Cal. 22; *Merritt v. Brown*, 19 N. J. Eq. 287; *Rich v. Doane*, 35 Vt. 125; *Haines v. Thomson*, 70 Pa. St. 434.

³ *Newton v. Newton*, 11 R. I. 390.

⁴ *Kearney v. Macomb*, 16 N. J. Eq. 189.

is, whether the contract is a security for the repayment of money, or an actual or conditional sale.¹

The rights of the parties to the conveyance must be reciprocal. If the transaction be in the nature of a mortgage, so that the grantor may insist upon a reconveyance, the grantee at the same time may insist upon repayment; but if it be a conditional sale, so that the grantor need not repurchase except at his option, the grantee cannot insist upon repayment.²

An absolute deed was made with an agreement by the grantee executed at the same time, whereby it was stipulated that the grantor might at his election repurchase the lands for a certain sum in three months, and for certain other and greater sums in six and twelve months respectively, provided he would so elect at the expiration of six months from the date of the agreement, which sums were largely in excess of the consideration expressed in the deed, and six per cent. interest thereon. The election to repurchase not having been made within the time stipulated, the purchaser refused to allow a repurchase, and claimed that the sale and deed were absolute; the evidence showing that the transaction was really a loan, it was held that the grantor might redeem upon the payment of the consideration expressed in the deed, with interest.³

¹ *Holton v. Meighen*, 15 Minn. 69; *Hill v. Edwards*, 11 Minn. 22; *Weide v. Gehl*, 21 Minn. 449; *Hicks v. Hicks*, 5 G. & J. (Md.) 75; *Cole v. Bolard*, 22 Pa. St. 431; *Wheeland v. Swartz*, 1 Yeates (Pa.), 579; *Spence v. Steadman*, 49 Ga. 133; *Leahigh v. White*, 8 Nev. 147.

In *Robinson v. Cropsey*, 2 Edw. (N. Y.) 138, 143, the court say: "If a deed or conveyance be accompanied by a condition or matter of defeasance expressed in the deed, or even contained in a separate instrument, or exist merely in parol, let the consideration for it have been a preëxisting debt or a present advance of money to the grantor, the only inquiry necessary to be made is, whether the relation of debtor and creditor remains, and a debt still subsists between the parties; for if it does, then the conveyance must be regarded as a security for the payment, and be treated in all respects as a mortgage. On the other hand, where the debt forming the consideration for the conveyance

is extinguished at the time by the express agreement of the parties, or the money advanced is not paid by way of loan, so as to constitute a debt and liability to repay it, but by the terms of the agreement the grantor has the privilege of refunding or not at his election, then it must be purchase money, and the transaction will be a sale upon condition, which the grantor can defeat only by a repurchase, or performance of the condition on his part within the time limited for the purchase, and in this way entitle himself to a reconveyance of the property."

² *Williams v. Owen*, 10 Sim. 386; *Davis v. Thomas*, 1 Russ. & M. 506; *Shaw v. Jeffery*, 13 Moore P. C. 432; *Goodman v. Grierson*, 2 Ball & B. 274; *Alderson v. White*, 2 De G. & J. 97; *Tapply v. Sheather*, 8 Jur. N. S. 1163.

Text quoted with approval in *McNamar v. Culver*, 22 Kans. 661, 669.

³ *Klinck v. Price*, 4 West Va. 4.

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265. The existence of a debt is the test. If an absolute conveyance be made and accepted in payment of an existing debt, and not merely as security for it, an agreement by the grantee to reconvey the land to the grantor upon receiving a certain sum within a specified time does not create a mortgage but a conditional sale, and the grantee holds the premises subject only to the right of the grantor to demand a reconveyance according to the terms of the agreement.¹ A debt either preëxisting or created at the time is an essential requisite of a mortgage.² "Where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute deed into a mortgage."³ The debt may not be evidenced by any bond or note, or covenant to pay it; so that the facts and circumstances of the transaction must be inquired into in order to ascertain whether the consideration of the deed was really a debt or loan; if not one or the other, the deed can hardly be a mortgage.⁴

An agreement by the grantee in an absolute conveyance, that if the grantor should, within a certain time, bring him the amount of the consideration of the deed with interest, he would deliver up the deed, but otherwise the grantor should forfeit all claim to such deed, was held not to be a defeasance of a mortgage, as there was no debt secured, but merely a contract to reconvey on certain terms.⁵ But whenever a debt is recognized by the parties or established by evidence, such an agreement serves to make a mortgage of the conveyance;⁶ as where a grantee a year after the making of the deed to him gave a bond reciting that there had been a loan, and that the conveyance was made to secure it, the transaction was a mortgage, although the bond con-

¹ See § 325; *Stinchfield v. Milliken*, 71 Me. 567; *Morrison v. Brand*, 5 Daly (N. Y.), 40; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *O'Neill v. Capelle*, 62 Mo. 202; *Hall v. Savill*, 3 Greene (Iowa), 37; *Ruffier v. Womack*, 30 Tex. 332; *Honore v. Hutchings*, 8 Bush (Ky.), 687; *Slowey v. McMurray*, 27 Mo. 113; *Magnusson v. Johnson*, 73 Ill. 156; *Pitts v. Cable*, 44 Ill. 103; *French v. Sturdivant*, 8 Me. 246; *West v. Hendrix*, 28 Ala. 226; *Haynie v. Robertson*, 58 Ala. 37; *Hillhouse v. Dunning*, 7 Conn. 139, 143; *Spence v. Steadman*, 49 Ga. 133; *Murphy v. Purifoy*, 52 Ga. 480; *Snively v. Pickle*, 29 Gratt. (Va.) 27; *Smith v.*

Crosby, 47 Wis. 160; and see *Wells v. Morrow*, 38 Ala. 125, for circumstances rendering the transaction a mortgage.

² *McNamara v. Culver*, 22 Kans. 661, 668.

³ Per *Bronson, J.*, in *Glover v. Payn*, 19 Wend. (N. Y.) 518.

⁴ *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Lund v. Lund*, 1 N. H. 39; *Henley v. Hotaling*, 41 Cal. 22; *Galt v. Jackson*, 9 Ga. 151.

⁵ *Reading v. Weston*, 7 Conn. 143; and see *Pearson v. Seay*, 35 Ala. 612.

⁶ *Alstin v. Cundiff*, 52 Tex. 453.

tained a condition that if the money was not paid on a day named the obligation should be void.¹ And so where a grantee executed a bond to the grantor reciting the deed to him and the grantor's indebtedness, and providing that if the debt should be paid on or before a certain day the bond should be void, but that the bond should remain in force if the grantee after payment should neglect or refuse to reconvey the land, the transaction was held to be a mortgage.²

In a case before the Supreme Court of California,³ the agreement was that the grantee should execute a bond to reconvey the premises; but the grantor did not agree to repurchase, and the bond was delivered as an escrow, and it remained an escrow until after the time therein mentioned for the execution of the deed, and was then cancelled. If the deed was intended as a mortgage, say the court, the mortgagee would have a right of action to foreclose the mortgage; but if he had brought such an action, the answer that there was no promise, either express or implied, on the part of the alleged mortgagor to repay the purchase money, would have been a complete bar.

266. When an absolute conveyance has been made upon an application for a loan, and an agreement is made to reconvey upon payment of the money advanced, as a general rule the transaction is adjudged to constitute a mortgage.⁴ In each case the purpose of the grantor was in the beginning to borrow money; and unless a change be shown in his intentions it is presumed that any use he may have made of his real estate, in connection with it, was merely as a pledge to secure a loan.⁵

The parties having originally met upon the footing of borrowing and lending, although a different consideration be recited in

¹ *Montgomery v. Chadwick*, 7 Iowa, 114.

² *Van Wagner v. Van Wagner*, 7 N. J. Eq. (3 Halst.) 27.

³ *Henley v. Hotaling*, 41 Cal. 22, 28.

"This case differs from *Sears v. Dixon*, 33 Cal. 326, in the important particular, that in that case the mortgagor covenanted to repay the purchase money at a fixed time, and, under the name of rent, to pay interest thereon at a stipulated rate; and the court also found that the parties intended to execute a mortgage; but in this case the court found that the parties intended the deed

to be in fact, as it was in form, an absolute conveyance." And see § 247.

⁴ *Russell v. Southard*, 12 How. 139; *Miller v. Thomas*, 14 Ill. 428; *Parmelee v. Lawrence*, 44 Ill. 405; *Wheeler v. Ruston*, 19 Ind. 334; *Cross v. Hepner*, 7 Ind. 359; *Crassen v. Swoveland*, 22 Ill. 427; *Brown v. Nickle*, 6 Pa. St. 390; *Kellum v. Smith*, 33 Pa. St. 158; *Holmes v. Grant*, 8 Paige (N. Y.), 243; *Davis v. Demming*, 12 W. Va. 246.

⁵ *Anon. 2 Hayw. (N. C.) 26*; *Crews v. Threadgill*, 35 Ala. 334; *Davis v. Hemenway*, 27 Vt. 589.

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the deed, it will be considered a mortgage until it be shown that the parties afterwards bargained for the property independently of the loan.¹ But an application for a loan may in any case result in a sale of land absolutely or conditionally, and because the transaction began with such an application it is not to be concluded that it necessarily ended in a loan. The language of the courts, in some cases, would seem to imply that a court of equity would always allow redemption in such case; but although such transactions should be carefully scrutinized, when it appears that the negotiations resulted in a sale absolute or conditional this will be supported.²

The terms of a contract, to the effect that the grantee would reconvey upon the payment of a certain sum and interest, less the rents he might receive, tend to show that the debt, whether preëxisting or created at the time, was not extinguished, although it be declared in the contract that it is merely an agreement to reconvey, and not an acknowledgment of a mortgage.³

267. An absolute deed delivered in payment of a debt is not converted into a mortgage merely because the grantee therein gives a contemporaneous stipulation, binding him to reconvey on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, the transaction will be held an absolute sale notwithstanding.⁴ And so if there was, in fact, a sale, an agreement by the purchaser to resell the property within a limited time, at the same price, does not convert it into a mortgage.⁵ A farmer agreed with another that he might sell the farm and have all he could obtain above \$2,000; and to give effect to this agreement the farmer conveyed to him the land, and took back a reconveyance, on condition that the reconveyance

¹ *Morris v. Nixon*, 1 How. 118; and see, also, *Dwen v. Blake*, 44 Ill. 135; *Smith v. Doyle*, 46 Ill. 451; *Phillips v. Hulsizer*, 20 N. J. Eq. 308; *Crews v. Threadgill*, 35 Ala. 334; *Sweetzer's Appeal*, 71 Pa. St. 264; *Tibbs v. Morris*, 44 Barb. (N. Y.) 138; *Marvin v. Prentice*, 49 How. (N. Y.) Pr. 385; *Fiedler v. Darrin*, 50 N. Y. 437, 441; 59 Barb. (N. Y.) 651; *Leahigh v. White*, 8 Nev. 147; *Knowlton v. Walker*, 13 Wis. 264; *Richardson v. Barrick*, 16 Iowa, 407.

² *Flagg v. Mann*, 14 Pick. (Mass.) 467;

Holmes v. Fresh, 9 Mo. 201, 206; *Turner v. Kerr*, 44 Mo. 429; *McDonald v. McLeod*, 1 Ired. (N. C.) Eq. 221.

³ *People v. Irwin*, 14 Cal. 428.

⁴ See § 326; *Turner v. Kerr*, *supra*; *Farmer v. Grose*, 42 Cal. 169; *Page v. Vilhac*, 42 Cal. 75; *Baughner v. Merryman*, 32 Md. 185; *Weathersly v. Weathersly*, 40 Miss. 462; *Hoopees v. Bailey*, 28 Miss. 328; *Morrison v. Brand*, 5 Daly (N. Y.), 40.

⁵ *Mason v. Moody*, 26 Miss. 184.

should be void upon payment of \$2,000. The transaction was of course held to be a conditional sale.¹

But if the indebtedness be not cancelled, equity will regard the conveyance as a mortgage, whether the grantee so regard it or not. He cannot at the same time hold the land absolutely and retain the right to enforce payment of the debt on account of which the conveyance was made. The test, therefore, in cases of this sort, by which to determine whether the conveyance is a sale or a mortgage, is to be found in the question whether the debt was discharged or not by the conveyance.² If in the subsequent transactions of the parties there is no recognition in any way of the relation of debtor and creditor, and the vendee for a considerable period holds possession without paying interest or rent, these facts go to show that there is only an agreement for repurchase and not a mortgage.³

268. Where one induces a third person to become the purchaser, and he agrees to convey it to the other if certain payments are made to him within a specified time, in default of payment there is no right of redemption afterwards.⁴ If the relation of debtor and creditor is not created between the parties, the transaction is not a mortgage but a conditional sale.⁵ This is the test to be applied in every case. It is a question of fact, for the determination of which equity allows a wide range of inquiry into the relations of the parties and the circumstances of the case; and from the facts the law deduces the inference, either that there was a sale absolutely or upon condition, or else that the transaction was a mortgage.⁶

When a person advances money, and at the same time receives

¹ § 270. *Porter v. Nelson*, 4 N. H. 130.

² *Sutphen v. Cushman*, 35 Ill. 186.

³ *O'Reilly v. O'Donoghue, Jr.* Rep. 10 Eq. 73. The Master of the Rolls acted upon this principle in a transaction held to be a sale where the agreement for repurchase was founded upon the following letter: "At any time within the next ten years you come forward and pay me £160, provided you want it for yourself or any of your children. . . . I will hand you possession of the same with pleasure, and become your yearly tenant."

⁴ See § 331; *Hill v. Grant*, 46 N. Y. 496; *Stephenson v. Thompson*, 13 Ill.

186; *Roberts v. McMahan*, 4 Greene (Iowa), 34; *Hull v. McCall*, 13 Iowa, 467.

⁵ *Galt v. Jackson*, 9 Ga. 151; *Chapman v. Ogden*, 30 Ill. 515; *Humphreys v. Snyder*, 1 Morris (Iowa), 263. See § 272.

⁶ *Rice v. Rice*, 4 Pick. (Mass.) 349; *Henry v. Davis*, 7 Johns. (N. Y.) Ch. 40; *Sweetzer's Appeal*, 71 Pa. St. 264; *Todd v. Campbell*, 32 Pa. St. 250; *Hiester v. Maderia*, 3 W. & S. (Pa.) 384; *Robinson v. Willoughby*, 65 N. C. 520; *Goulding v. Bunster*, 9 Wis. 513; *Turner v. Kerr*, 44 Mo. 429; *McNees v. Swaney*, 50 Mo. 388; *Micon v. Ashurst*, 55 Ala. 607; *Stinchfield v. Milliken*, 71 Me. 567.

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a deed and gives back to the grantor a bond to reconvey, these facts incline to the belief that the transaction is a loan and a security. But the case is different when the obligation to convey is given to a person other than the grantor.¹

269. That there is no continuing debt is a strong circumstance to show that the transaction is a contract for repurchase. If the proof establishes that the consideration money was a loan, and the party receiving it is personally liable for its repayment, that constitutes it a debt; it does not require a writing to make it such, nor is it extinguished by or merged in a mortgage taken for security.² Unless the relation of debtor and creditor existed between the parties in the beginning in reference to the consideration of the conveyance, and the relation continues so that the grantee would have the right to call upon the grantor to supply any deficiency that might arise in case of a foreclosure and sale of the premises, the agreement to reconvey in connection with the deed constitutes a conditional sale.³ If there was no loan in the beginning, or if a prior debt was extinguished by the conveyance, and the grantor merely has the privilege of repaying if he pleases, by a given time, and of receiving a reconveyance, the transaction is a conditional sale.⁴

There can be no mortgage without a debt. There may be agreements for the performance of obligations other than the payment of money; but leaving these out of view, it is essential that there be an agreement, either express or implied, on the part of the mortgagor, or some one in whose behalf he executes the mortgage, to pay to the mortgagee a sum of money either on account of a preëxisting debt or a present loan.⁵

270. An agreement that the grantee may buy the property absolutely, after a specified time, is regarded as a circumstance tending to show that the transaction is a conditional sale. Thus where the grantee's covenant, executed at the same time with an absolute conveyance to him, recited that this was made for the

¹ Carr v. Rising, 62 Ill. 14. See Smith v. Sackett, 15 Ill. 528; Davis v. Hopkins, Ib. 519, for cases where a third party furnished the money, but was not a party to the transaction. Also § 331.

² Phillips v. Hulsizer, 20 N. J. Eq. 308; Porter v. Clements, 3 Ark. 364; Farmer v. Grose, 42 Cal. 169.

³ Robinson v. Cropsey, 2 Edw. (N. Y.) 138; Saxton v. Hitchcock, 47 Barb. (N.

Y.) 220; Slowey v. McMurray, 27 Mo. 113; Hoopes v. Bailey, 28 Miss. 328; Johnson v. Clark, 5 Ark. 321; Blakemore v. Byrnside, 7 Ark. 505, 509; De Bruhl v. Maas, 54 Tex. 464.

⁴ De Bruhl v. Maas, *supra*.

⁵ Henley v. Hotaling, 41 Cal. 22, 28, per Rhodes, C. J.; and see Usher v. Livermore, 2 Iowa, 117; Klein v. McNamara, 54 Miss. 90. Also, see § 272.

purpose of paying a certain sum of money, and stipulated that he would not convey the premises within one year without the consent of the grantor, and, if the grantor, within that time, should find a purchaser, the grantee would convey the land on receiving the amount with interest for which the land had been conveyed to him; and that in case such sale should not be made within the year, it should then be submitted to certain persons named, to determine what additional sum the grantee should pay for the land, which sum he covenanted to pay, the transaction was held not to be a mortgage, but a conditional sale giving the grantee the right to recover possession of the land, after the expiration of the year, in ejectment against the grantor.¹ In like manner an agreement by the grantee made as a part of the transaction whereby he is to account to the grantor for a portion of the profits which may be realized on a resale of the premises if made within a specified time, and requiring him to sell if a specified price can be obtained, is not inconsistent with the vesting of the title.²

271. On the other hand, an agreement that the grantee may sell all the property for the best possible price and retain from the proceeds the amount due him, paying the residue to the grantor, shows that the transaction is a mortgage,³ until the power of sale is executed.⁴ In case the land should sell for a less sum than the debt, the grantee is entitled to recover the deficiency.⁵ And so a conveyance to a trustee with power to sell the land, pay the creditor from the proceeds, and deliver the balance to the grantor on his failure to pay the debt, is a mortgage, and subject to the provisions of a registry law relating to mortgages.⁶ But a stipulation that if the grantor can, within a limited time, "dispose of the land conveyed to better advantage," he may do so, paying to the grantee the "consideration money" mentioned in the deed, does not make the instrument a

¹ *Baker v. Thrasher*, 4 Den. (N. Y.) 493.

² § 267; *Macaulay v. Porter*, 71 N. Y. 173.

³ *Ogden v. Grant*, 6 Dana (Ky.), 473; *Crane v. Buchanan*, 29 Ind. 570; *Ruffners v. Putney*, 12 Gratt. (Va.) 541; *Hagthorp v. Hook*, 1 G. & J. (Md.) 270; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470; *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 200; *Kidd v. Teeple*, 22 Cal. 255.

⁴ *Eaton v. Whiting*, 3 Pick. (Mass.) 484.

⁵ *Palmer v. Gurnsey*, 7 Wend. (N. Y.) 248, distinguished and questioned in *Baker v. Thrasher*, 4 Den. (N. Y.) 493; *Macaulay v. Porter*, *supra*.

⁶ *Woodruff v. Robb*, 19 Ohio, 212; and see *Irwin v. Longworth*, 20 Ohio, 581; *Walsh v. Brennan*, 52 Ill. 193. See, however, *Alleghany R. R. & Coal Co. v. Casey*, 79 Pa. St. 84.

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mortgage.¹ And so a covenant by the grantor, who is a joint tenant, not to make partition without the advice and consent of the grantee, does not turn a conditional sale into a mortgage.²

272. The fact that there is no agreement for the payment of the debt is a circumstance entitled to considerable weight, as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist.³ "The want of a covenant to repay the money," says Chief Justice Marshall,⁴ "is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." No conveyance can be a mortgage unless made for the purpose of securing the payment of a debt, or the performance of a duty either existing or created at the time, or else to be created or to arise in the future. But it is not necessary that the debt or duty should be evidenced by any express covenant, or by any separate written security.⁵ Although a mortgage cannot be a mortgage on one side only, but must be a mortgage with both parties,⁶ yet this principle is applicable to the lien upon the land only, and not to the personal obligation.

The fact that there is no collateral undertaking by the grantor for the payment of money, or the performance of any obligation, is by no means conclusive of the nature of the transaction. This is only one circumstance to be regarded in ascertaining whether it is to be treated as a mortgage or a sale with a contract for repurchase.⁷ It affects the equitable rights and claims of the parties. If there be no contract for the repayment of the money, the grantee must bear any loss arising from depreciation in value; and it would seem equitable, on the other hand, that he should have the benefit of any advance in the value of the property, if the repurchase be not made within the stipulated period.

A debtor conveyed to his sureties certain land, taking from

¹ *Stratton v. Sabin*, 9 Ohio, 28.

⁶ *Copleston v. Boxwill*, 1 Ch. Ca. 1;

² *Cotterell v. Purchase*, For. 61; Cas. temp. Talb. 61.

White v. Ewer, 2 Vent. 340.

³ *Horn v. Keteltas*, 46 N. Y. 605; *Brumfield v. Boutall*, 24 Hun (N. Y.), 451; *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Bacon v. Brown*, 19 Conn. 34; *Jarvis v. Woodruff*, 22 Conn. 548, 550.

⁷ *Murphy v. Calley*, 1 Allen (Mass.), 107; *Flagg v. Mann*, 14 Pick. (Mass.) 467-479; *Rice v. Rice*, 4 Ib. 349; *Brant v. Robertson*, 16 Mo. 129; *Bodwell v. Webster*, 13 Pick. (Mass.) 411, 415; *Flint v. Sheldon*, 13 Mass. 443, 448; *Kelly v. Beers*, 12 Mass. 387; *Brown v. Dewey*, 1 Sandf. (N. Y.) Ch. 56; S. C. 2 Barb. (N. Y.) 28.

⁴ In *Conway v. Alexander*, 7 Cranch, 218.

⁵ *Brant v. Robertson*, 16 Mo. 129; *Fisk v. Stewart*, 24 Minn. 97.

them a bond providing that the obligors should pay his debt, and stating that "the intent of the deed was to indemnify and save them harmless." The bond also referred to the deed as "indemnity and security in addition to security" of other lands mortgaged to the obligors, and stipulated that the land should not be sold for three years, so that the debtor "may redeem if he chooses to do so." If the obligors were not "reimbursed" within the three years, they were to hold the lands free from all claim on the debtor's part, but they agreed to place no obstacles in the way of his "paying said debts and redeeming the said lands." The transaction was adjudged to be a mortgage, and not a conditional sale, although there was no covenant on the part of the grantor to pay the debt.¹

273. The fact that interest is payable, by the terms of the contract, upon the money advanced by the person who takes the title to the property, is a circumstance tending to show that the transaction was a loan upon security instead of a conditional sale. Anything tending to show that there was a subsisting debt, or an advance by way of loan, goes to prove the transaction to be a mortgage.²

What is in fact a payment of interest is sometimes disguised under the payment of rent by the grantor in possession to the grantee; but although the transaction has the appearance of a conditional sale, the payment of rent in lieu of interest may be a circumstance tending to show that it is in fact a mortgage.³ If a conveyance of land be made in fee, and the grantee give back a bond to reconvey upon repayment of the consideration money, and

¹ *Wing v. Cooper*, 37 Vt. 169.

² *Murphy v. Calley*, 1 Allen (Mass.), 107; *Farmer v. Grose*, 42 Cal. 169; *Harbison v. Houghton*, 41 Ill. 522; *Honore v. Hutchings*, 8 Bush (Ky.), 687.

"Hutchings and Honore, in 1861, jointly purchased thirty acres of land near Chicago, Ill. Hutchings advanced the entire purchase price, took a conveyance to himself, and executed a writing in which, among other things, 'it is agreed between said parties, that when said land is sold said Hutchings is to have first his six thousand dollars so advanced, and ten per cent. interest, and the profits over and above said sum are to be equally divided between said parties. . . . This arrangement is to continue eighteen months,

when, if the property has not been sold, said Honore is to pay one half the sum so advanced, with the accrued interest, or said Hutchings is to be the sole owner of the same.' The land was not sold within the time specified, and Honore failed to pay any part of the sum advanced. In 1869, Hutchings sold the land for \$100,000, and refused to pay any part of the profits to Honore. But it was decided that Hutchings held the legal title to one half the land in trust for Honore, and must account for the proceeds according to the agreement."

³ *Wright v. Bates*, 13 Vt. 341; *Woodward v. Pickett*, 8 Gray (Mass.), 617; *Preschbaker v. Feaman*, 32 Ill. 475; *Ewart v. Walling*, 42 Ill. 453.

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to permit the grantor to occupy the premises at a rent equal to the interest on the consideration, these are parts of one and the same transaction, and constitute a mortgage.¹

The owner of land occupied by him as a homestead executed an absolute conveyance of it in consideration of one thousand dollars, and the grantee at the same time executed with him a joint instrument stipulating that the grantor should have the privilege of repurchasing the premises for the same price, at any time within twelve months, and should remain in possession, and pay rent at the rate of forty dollars per month until such repurchase, or the expiration of the twelve months. He remained in possession eleven years, and paid over twelve hundred dollars as rents. The transaction was held to be a mortgage; that the rent was a device to screen usury, and that the debt had been extinguished by the payments made.²

274. The continued possession of the grantor, as is elsewhere noticed with reference to proving by parol that an absolute conveyance is not a sale, is a circumstance tending to show that the agreement for repurchase, in connection with the deed, constitutes a mortgage rather than a conditional sale.³

275. Inadequacy of price is one of the circumstances which are considered as of weight, as tending to show that an absolute conveyance accompanied by an agreement to reconvey is a mortgage rather than a conditional sale. This alone will not authorize a court to give the grantor a right to redeem; but in connection with other evidence affords much ground of inference that the transaction was not really what it purports to be.⁴ Inadequacy of price, to be of controlling effect, must be gross.⁵ If it be very inadequate, it is a circumstance tending to show a loan

¹ Woodward v. Pickett, 8 Gray, 617.

² In Boatright v. Peck, 33 Tex. 68.

³ See §§ 329, 600, the cases being equally applicable here; Ransone v. Frayser, 10 Leigh (Va.), 592; Gibson v. Eller, 13 Ind. 124; Clark v. Finlon, 90 Ill. 245.

⁴ See § 329; Thornborough v. Baker, 3 Swanst. 628, 631; Davis v. Thomas, 1 Russ. & M. 506; Williams v. Owen, 5 M. & C. 303; Douglass v. Culverwell, 3 Gif. 251; Langton v. Horton, 5 Beav. 9; Russell v. Southard, 12 How. 139; Campbell v. Dearborn, 109 Mass. 130, 144; Freeman v. Wilson, 51 Miss. 329; Davis v. Stonestreet, 4 Ind. 101; Pearson v. Seay,

35 Ala. 612; Steel v. Black, 3 Jones (N. C.) Eq. 427; Streater v. Jones, 3 Hawks (N. C.), 423; Sellers v. Stalcup, 7 Ired. (N. C.) Eq. 13; Kemp v. Earp, Ib. 167; Wharf v. Howell, 5 Binn. (Pa.) 499. In this case a lot worth \$800 was conveyed in consideration of \$200, with an agreement to reconvey upon the payment of this sum within three months. Thompson v. Banks, 2 Md. Ch. 430; Crews v. Threadgill, 35 Ala. 334; Brown v. Dewey, 2 Barb. (N. Y.) 28.

⁵ Elliott v. Maxwell, 7 Ired. (N. C.) Eq. 246.

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and mortgage ; but it is not conclusive. Nor would the fact of the adequacy of the price, taken in connection with the absence of any obligation to repay the money, be conclusive that a conditional sale was intended.¹ Nevertheless, the fact that the consideration is fully equal to the value of the land is evidence of some weight that the transaction was a sale and not a mortgage, because men in making a loan do not usually advance the full amount of the land.²

If the transaction creates no debt or loan, but only a right to repurchase, it is immaterial whether the consideration for the reconveyance is fixed at the same price paid for the conveyance, or at an advanced price.³

276. When the transaction is otherwise a conditional conveyance and not a mortgage, the latter character is not imparted to it by the mere fact that the instrument is recorded as a mortgage.⁴ The acts or declarations of one party in reference to the transaction afterwards will not change its character. The transaction remains what the parties made it in the beginning, until by mutual agreement they change it. It can hardly be said that the treatment of an absolute deed as conditional by the grantee can make it a mortgage. If it was a mortgage in the beginning, his admission of the fact only relieves the mortgagor from proving it. If it was not a mortgage in the beginning, his treating it as such has no effect unless the mortgagor concurs in so treating it, so that, in fact, by mutual agreement, the character of the instrument is changed.⁵

277. Parol evidence is admissible in equity to show that a conditional sale, and not a mortgage, was intended in case there is nothing on the face of the papers to determine whether the transaction was the one or the other. The question is then to be decided by the jury under instructions, and not by the court.⁶ For this purpose evidence of the repeated assertions of the grantee that he had bought the property and owned it, of his repeated denials that the grantor had any interest in it, and of

¹ *Brown v. Deway*, 2 Barb. (N. Y.) 28 ; 4 0 ; *Jackson v. Richards*, 6 Cow. (N. Y.) S. C. 1 Sandf. (N. Y.) Ch. 56. 617, 619.

² *Carr v. Rising*, 62 Ill. 14, 19, per Walker, J.

³ *Glover v. Payn*, 19 Wend. (N. Y.) 518 ; *West v. Hendrix*, 28 Ala. 226 ; *French v. Sturdivant*, 8 Me. 246 ; *Pitts v. Cable*, 44 Ill. 103.

⁴ *Morrison v. Brand*, 5 Daly (N. Y.),

⁵ See, on this point, but not wholly agreeing with the statement in the text, *Holmes v. Fresh*, 9 Mo. 201 ; *Thomaston Bank v. Stimpson*, 21 Me. 195 ; *Nichols v. Reynolds*, 1 R. I. 30.

⁶ *Alstin v. Candiff*, 52 Tex. 453.

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acts of ownership inconsistent with the position of a mere mortgagee, may be received.¹

But if the instrument on its face be a mortgage, or if a deed and bond of defeasance be executed together as part of the same transaction, and therefore constitute a mortgage, parol evidence is not admissible to show that the parties intended that the transaction should operate as a conditional sale. It is then for the court to construe the instruments and determine their legal effect.² No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage.³ In the one the proof raises an equity consistent with the writing, and in the other the proof would contradict the writing.⁴

And, on the other hand, parol evidence is admissible in equity to show that a formal conveyance, with a defeasance executed at the same time, or afterwards, constituted in fact a mortgage, and not a conditional sale.⁵

But although a formal conveyance can be shown to be a mortgage by extrinsic evidence, a formal mortgage cannot be shown to be a conditional sale.⁶ The reason of the rule, that a formal conveyance may be shown by parol to be a mortgage, while a formal mortgage cannot be shown to be a conditional, by the same means, is, that, "in the one case such proof raises an equity consistent with the writing, while in the other it would contradict the writing."⁷ When the transaction is a sale, with a right of repurchase, and the grantor claims it to be a mortgage, a bill will lie to have the sale established.⁸

Such evidence is inadmissible at law.⁹ It is received only in

¹ See §§ 246, 282; *Newcomb v. Bonham*, 1 Vern. 8, 214, 232; *Langton v. Horton*, 5 Beav. 9; *Hanford v. Blessing*, 80 Ill. 188.

² *Alstin v. Cundiff*, 52 Tex. 453.

³ *Wing v. Cooper*, 37 Vt. 169; *Woods v. Wallace*, 22 Pa. St. 171; *Colwell v. Woods*, 3 Watts (Pa.), 188; *Kunkle v. Wolfersberger*, 6 Ib. 126; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, 138; *Brown v. Nickle*, 6 Pa. St. 390.

⁴ *Kunkle v. Wolfersberger*, 6 Watts (Pa.), 126.

⁵ *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Farmer v. Grose*, 42 Cal. 169; and see *Gay v. Hamilton*, 33 Cal. 686; *Till-*

son v. Moulton, 23 Ill. 648; *Heath v. Williams*, 30 Ind. 495.

⁶ *McClintock v. McClintock*, 3 Brews. (Pa.) 76; *Wharf v. Howell*, 5 Binn. (Pa.) 499; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131, 138.

⁷ Per Gibson, C. J., in *Kunkle v. Wolfersberger*, 6 Watts (Pa.), 126; *Woods v. Wallace*, 22 Pa. St. 171.

⁸ *Rich v. Doane*, 35 Vt. 125.

⁹ *Webb v. Rice*, 6 Hill (N. Y.), 219; *Bragg v. Massie*, 38 Ala. 89; *McClane v. White*, 5 Minn. 178; *Belote v. Morrison*, 8 Minn. 87. *Contra*, *Tillson v. Moulton*, *supra*. See § 282.

equity, and when there exist equitable grounds for its admission. It is held, too, that the rule admitting parol evidence in equity for the purposes mentioned does not extend to an official conveyance, such as the deed of a sheriff selling under process.¹ Such officer has no power to make any sale other than an absolute one.

278. Very slight circumstances showing that the transfer was not understood at the time to be absolute, but was made to secure the repayment of the sum advanced, may be sufficient to turn the scale, if the evidence be not clear whether the transaction was a sale of the securities or only a mortgage of them.² And so where there is an agreement to reconvey, very slight circumstances will suffice, in relation to such a transaction, to determine its character, — whether it is a mortgage or an absolute conveyance with a stipulation securing the grantor a reconveyance upon certain terms and within a certain time.³ Thus the circumstance that the reconveyance is to be made upon payment of the precise amount of the consideration, with interest, is taken into consideration as favoring the conclusion that a loan was made.⁴

279. When it is doubtful whether the transaction is a mortgage or a conditional sale, it will generally be treated as a mortgage,⁵ although it is in some of the cases said that the transaction appearing upon its face to be a conditional sale will be held to be such when no circumstances appear showing an intention that it should be considered a mortgage.⁶ But generally courts of equity incline against conditional sales, and give the benefit of any doubt arising upon the evidence in favor of the grantor's right to redeem.⁷ "It is unquestionably true, that in cases where

¹ *Ryan v. Dox*, 25 Barb. (N. Y.) 440.

² *McKinney v. Miller*, 19 Mich. 142, 148.

³ *Waite v. Dimick*, 10 Allen (Mass.), 364.

⁴ *Hickox v. Lowe*, 10 Cal. 197. See § 275.

⁵ See §§ 335, 336; *Russell v. Southard*, 12 How. 139; *O'Neill v. Capelle*, 62 Mo. 202; *Brant v. Robertson*, 16 Mo. 129; *Turner v. Kerr*, 44 Mo. 429; *Desloge v. Ranger*, 7 Mo. 327; *Heath v. Williams*, 30 Ind. 495; *Bacon v. Brown*, 19 Conn. 34; *Trucks v. Lindsey*, 18 Iowa, 504; *Baughner v. Merryman*, 32 Md. 185; *Klein v. McNamara*, 54 Miss. 90; *Snively v.*

Pickle, 29 Gratt. (Va.) 27; *De Bruhl v. Maas*, 54 Tex. 464.

⁶ *Swetland v. Swetland*, 3 Mich. 482; *Robinson v. Cropsey*, 2 Edw. (N. Y.) 138.

⁷ *Fee v. Cobine*, 11 Ir. Eq. Rep. 406; *Trucks v. Lindsey*, 18 Iowa, 504; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Robinson v. Cropsey*, 6 Paige (N. Y.), 480; *Turnipseed v. Cunningham*, 16 Ala. 501; *McNeill v. Norsworthy*, 39 Ala. 156; *Locke v. Palmer*, 26 Ala. 312; *Hickox v. Lowe*, 10 Cal. 196; *McKinney v. Miller*, 19 Mich. 142; *Cornell v. Hall*, 22 Mich. 377; *Poin-dexter v. McCannon*, 1 Dev. Eq. (N. C.) 377; *Dougherty v. McColgan*, 6 G. & J. (Md.) 275; *Artz v. Grove*, 21 Md. 456;

§§ 280, 281.] ABSOLUTE DEED AND AGREEMENT TO RECONVEY.

upon all the circumstances the mind is uncertain whether a security or a sale was intended, the courts, when compelled to decide between them, will be somewhat guided by prudential considerations, and will consequently lean to the conclusion that a security was meant, as more likely than a sale to subserve the ends of abstract justice and avert injurious consequences. And where the idea that a security was intended is conveyed with reasonable distinctness by the writings, and no evil practice or mistake appears, the court will incline to regard the transactions as a security rather than a sale, because in such a case the general reasons which favor written evidence concur with the reason just suggested."¹

280. The same considerations apply to an assignment of a mortgage, accompanied by an agreement to reassign within a time mentioned. In *Henry v. Davis*,² the Chancellor said: "It is clearly established by the answer and proofs that the bond and mortgage were assigned by the plaintiff to the defendant by way of mortgage, to secure the payment of \$225 by a given day; and any agreement that the assignment was to be an absolute sale, without redemption upon default of payment on the day, was unconscientious, oppressive, illegal, and void. The equity of redemption still existed in the plaintiff, notwithstanding any such agreement." The same considerations apply also to an assignment of a lease made in connection with an agreement to reassign, and to the determination of the question whether they constitute a mortgage or a conditional sale of the leasehold estate.³ But an absolute lease is not deemed a mortgage because the rent is to go in satisfaction of a debt.⁴

281. When a mortgage rather than a trust. — A declaration of trust made by one to whom a conveyance was made upon

Baughner v. Merryman, 32 Md. 185; *Freeman v. Wilson*, 51 Miss. 329; *Scott v. Henry*, 13 Ark. 112; *Heath v. Williams*, 30 Ind. 496; *Williams v. Bishop*, 15 Ill. 553; *Bishop v. Williams*, 18 Ib. 101; *Miller v. Thomas*, 14 Ill. 428; *Pensoneau v. Pulliam*, 47 Ill. 58; *Holton v. Meighen*, 15 Minn. 69.

"A resort, however, to a formal conditional sale, as a device to defeat the equity of redemption, will, of course, when shown, be unavailing for that purpose. And the possibility of such resort, together with other considerations, has driven

courts of equity to adopt as a rule, that, when it is doubtful whether the transaction is a conditional sale or a mortgage, it will be held to be the latter." *Trucks v. Lindsey*, 18 Iowa, 504, per Cole, J.

¹ *Cornell v. Hall*, 22 Mich. 377, 383, per Graves, J.

² 7 Johns. (N. Y.) Ch. 40.

³ *Polhemus v. Trainer*, 30 Cal. 685; and see *King v. King*, 3 P. Wms. 358; *Goodman v. Grierson*, 2 Ball & B. 274, 278.

⁴ *Halo v. Schick*, 57 Pa. St. 319.

his advancing money for the benefit of one having an agreement for the purchase of the land may be treated, in connection with the conveyance, as a mortgage rather than a trust.¹ A debtor conveyed all his real estate to one of his creditors by an absolute deed, the creditor making a declaration of trust that he would sell the property, pay the debt due himself, and sums to be advanced by him for the payment of other debts of the grantor, and after retaining a certain sum for commissions would reconvey what might remain of the property to the grantor. The transaction was adjudged to be a mortgage, and not an assignment for the benefit of creditors, and that no one but the grantor could call upon the grantee to account.² The equity of redemption was still subject to attachment by the creditors of the grantor.

But a conveyance expressly in trust to pay debts, and after the debts are paid in trust for one of the grantors, was held not to be a mortgage;³ and, therefore, the creditors could not maintain a suit for foreclosure or sale. In such a conveyance a covenant on the part of the debtor to pay the debts would, doubtless, make a mortgage of it.⁴

A declaration of trust by a grantee, to the effect that the money to be paid by him belonged to certain creditors of the grantor is not in the nature of a defeasance, and does not with the deed constitute a mortgage.⁵

¹ *Brumfield v. Boutall*, 24 Hun (N. Y.), 451. *Beav.* 11; *Jenkin v. Row*, 5 De G. & S. 107.

² *Taylor v. Cornelius*, 60 Pa. St. 187. Also, see *Vance v. Lincoln*, 38 Cal. 586; *Koch v. Briggs*, 14 Cal. 256; *Comstock v. Stewart*, Walk. (Mich.) 110; *Myers's Appeal*, 42 Pa. St. 518; *Gothainer v. Grigg*, 32 N. J. Eq. 567; *Chambers v. Goldwin*, 5 Ves. 834; *Bell v. Carter*, 17

³ *M'Menomy v. Murray*, 3 Johns. (N. Y.) Ch. 435; *Charles v. Claggett*, 3 Md. 82; *Marvin v. Titworth*, 10 Wis. 320.

⁴ *Taylor v. Emerson*, 4 Dr. & War. 117; *Holmes v. Matthews*, 3 Eq. Rep. 450.

⁵ *Frick's App.* 87 Pa. St. 327.

CHAPTER VIII.

PAROL EVIDENCE TO PROVE AN ABSOLUTE DEED A MORTGAGE.

- I. The grounds upon which it is admitted, 282-323. | II. What facts are considered, 324-342.

1. *The Grounds upon which it is admitted.*

282. It is a settled rule and practice of courts of equity to set aside a formal deed, and allow the grantor to redeem upon proof, even by parol evidence, that the conveyance was not a sale, but merely a security for a debt, and therefore a mortgage. Except where, as in New Hampshire and Georgia, the exercise of this power is prohibited by statute, there is probably now no dissent anywhere from the doctrine, that in equity a deed may be converted into a mortgage whenever there are proper equitable grounds for the exercise of the power. To this extent there is substantial uniformity in the decisions of the courts of the United States and of the several states. But as to the grounds upon which this equitable power is exercised there is much diversity of opinion, and there is also considerable diversity of adjudication in the application of the doctrine. Under what circumstances and upon what evidence this power shall be exercised, it is only reasonable to expect considerable divergence of practice in different courts. The cases in which the courts have been called upon to receive parol evidence to show that a deed absolute in terms is a mortgage are very numerous. For these reasons, and because the subject is of much practical importance, a statement of the rule in equity upon it in each of the states is given.

At law it is generally agreed that parol evidence to show that a deed absolute on its face was intended only as a mortgage is inadmissible.¹

¹ § 277; *Bryant v. Crosby*, 36 Me. 562; 10 Mo. 483; *Farley v. Goocher*, 11 Iowa, 570; *Webb v. Rice*, 6 Hill (N. Y.), 219; *Benton v. Jones*, 8 Conn. 186; *Reading v. West*, 8 Conn. 117; *Hogel v. Lindell*, 570; *Bragg v. Massie*, 38 Ala. 89; *McClane v. White*, 5 Minn. 178; *Belote v. Morrison*,

Parol evidence is admissible in equity to show that a deed absolute in form is in fact a mortgage, not because the rules of evidence are different in equity from what they are at law, but because the jurisdiction and power of the courts with reference to dealing with the facts presented are different. The rules of evidence are the same in both courts. The question whether an absolute deed was intended to operate as a mortgage is one which belongs exclusively to equity tribunals, and over which common law tribunals have no jurisdiction whatever.¹

283. To obtain relief the plaintiff must have equitable grounds for it. The grounds on which courts of equity admit oral evidence, to show that a deed absolute in form is in fact a mortgage, are purely equitable, and relief is refused whenever the equitable consideration is wanting. Therefore, when a debtor has made an absolute conveyance of his land to one creditor for the purpose of defrauding his other creditors, he is in no condition to ask a court of equity to interfere actively in his behalf to help him get his land back again, and thus secure to him the fruits of his fraudulent devices.² "One who comes for relief into a court whose proceedings are intended to reach the conscience of the parties must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns himself, he cannot insist upon applying it to the other party."³ An oral agreement between the debtor and creditor who took the conveyance, whereby the latter agreed to reconvey the land upon payment of the debt due him, is not deemed in such case an equitable ground for relief. The court will interfere only for the benefit of those whom the debtor intended to defraud. It is true that a grantee, whose rights were not infringed, cannot set up the grantor's fraud against other creditors in the conveyance, to defeat any legal claim or interest which the fraudulent debtor may seek to enforce. But the difficulty is, that when the debtor has no legal right, but comes into equity seek-

8 Minn 87; Moore v. Wade, 8 Kans. 380. In Illinois it is admissible at law as well. Tillson v. Moulton, 23 Ill. 648; Miller v. Thomas, 14 Ill. 428; Coates v. Woodworth, 19 Ill. 654. So in Wisconsin; see § 330. In Pennsylvania, § 312, and Texas, § 316, there are no chancery courts, and this evidence is admitted at law.

See article 13 West. Jur. 193, fully examining this subject.

¹ Foley v. Kirk, 33 N. J. Eq. 170; Stinchfield v. Milliken, 71 Me. 567.

² Hassam v. Barrett, 115 Mass. 256; Arnold v. Mattison, 3 Rich. (S. C.) Eq. 153, and see Webber v. Farmer, 4 Bro. P. C. 170; Baldwin v. Cawthorne, 19 Ves. 166.

³ Mr. Justice Wells, in Hassam v. Barrett, *supra*.

ing relief, he has in such case no equitable standing, and must go out of court.

284. The English decisions are to the effect that in equity an absolute conveyance may be construed to be a mortgage when the defeasance has been omitted by fraud or accident;¹ when the grantee has made a separate defeasance, although merely verbal;² or when by the payment of interest, or other circumstances, it appears that the conveyance was intended to be a mortgage.³

285. The doctrine in the United States Courts. — The decisions of the Supreme Court of the United States, and the Circuit and District Courts, are uniform in admitting parol evidence to show that an absolute conveyance is in fact a mortgage.⁴ The admission of such evidence is not limited to cases in which express deceit or fraud in taking the conveyance in that form is shown. It is admitted where the instrument of defeasance has been "omitted by design upon mutual confidence between the parties." It is admitted to show the real intention of the parties, and the real nature of the transaction. In *Russell v. Southard* the Supreme Court declare that when it is alleged and proved that a loan was really intended, and the grantee sets up the loan as a payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage; and that whenever the transaction is in substance a loan of money upon security of the land conveyed, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance to be a mortgage. In the late case of *Peugh v. Davis*⁵ the court also declare that as the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible.

¹ *Maxwell v. Montacute*, Prec. Ch. 526; *Card v. Jaffray*, 2 Sch. & Lef. 374; *England v. Codrington*, 1 Eden, 169; *Dixon v. Parker*, 2 Ves. Sen. 219, per Lord Hardwicke; *Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Ib. 219; *Lincoln v. Wright*, 4 De G. & J. 16.

² *Manlove v. Bale*, 2 Vern. 84; *Lincoln v. Wright*, *supra*; *Whitfield v. Parfitt*, 15 Jur. 852.

³ *Allenby v. Dalton*, 5 L. J. K. B. 312; *Cripps v. Jee*, 4 Bro. C. C. 472; *Sevier v. Greenway*, 19 Ves. 413.

⁴ *Russell v. Southard*, 12 How. 139; *Morris v. Nixon*, 1 How. 118; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Hughes v. Edwards*, 9 Wheat. 489; *Taylor v. Luther*, 2 Sum. 228; *Flagg v. Mann*, Ib. 486; *Eldredge v. Jenkins*, 3 Story, 181; *Bentley v. Phelps*, 2 Wood. & M. 426; *Wyman v. Babcock*, 2 Curtis, 386, 398; *S. C.* 19 How. 289; *Amory v. Lawrence*, 3 Cliff. 523; *Hubbard v. Stetson*, 3 MacArthur, 113.

⁵ 96 U. S. 332.

286. In Alabama a court of equity will not by parol evidence establish a deed absolute on its face as a mortgage, "unless the proofs are clear, consistent, and convincing" that it was not intended as an absolute purchase, but was intended as a security for money.¹ Such evidence seems to be admitted upon the ground of fraud, accident, or mistake.² It is in equity and not at law that parol evidence is admissible in such cases.³

Such a conveyance made by an embarrassed debtor is regarded in this state as fraudulent and void as against existing creditors.⁴

287. In Arkansas parol evidence is admissible to show an absolute deed to be a mortgage,⁵ and the ground of its admission is stated in some of the cases to be fraud or mistake;⁶ but in later cases it seems to be held generally admissible to show the intention of the parties, and the fact that the transaction was really a mortgage.⁷

288. In California parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and such evidence is not restricted to cases of fraud, accident, or mistake. Evidence of the circumstances and relations existing between the parties is admitted, not for the purpose of contradicting or varying the deed but to establish an equity superior to its terms. The deed must speak for itself; but the objects and purposes of the parties in executing the instrument may be inquired into. Fraud in the use of the deed is as much a ground for the interposition of equity as fraud in its creation. In *Pierce v. Robinson*⁸ Mr. Justice Field forcibly and clearly

¹ Phillips v. Croft, 42 Ala. 477.

² English v. Lane, 1 Port. (Ala.) 328; West v. Hendrix, 28 Ala. 226; Wells v. Morrow, 38 Ala. 125; Brantley v. West, 27 Ala. 542; Loeke v. Palmer, 26 Ala. 312; Bryan v. Cowart, 21 Ala. 92; Parish v. Gates, 29 Ala. 254; Crews v. Threadgill, 35 Ala. 334; Bishop v. Bishop, 13 Ala. 475.

³ Bragg v. Massie, 38 Ala. 89, 106; Jones v. Trawick, 31 Ala. 253, 256; Parish v. Gates, 29 Ala. 254, 261.

⁴ § 637.

⁵ Johnson v. Clark, 5 Ark. 321; Scott v. Henry, 13 Ark. 112; McCarron v. Cassidy, 18 Ark. 34.

⁶ Blakemore v. Byrnside, 7 Ark. 505; Jordan v. Fenno, 13 Ark. 593.

⁷ Anthony v. Anthony, 23 Ark. 479.

⁸ Pierce v. Robinson, 13 Cal. 116; overruling the earlier cases of Lee v. Evans, 8 Cal. 424, and Low v. Henry, 9 Cal. 538; restricting such evidences to cases of fraud, accident, or mistake.

In further illustration of the reason of the rule the learned judge says: "Unless parol evidence can be admitted, the policy of the law will be constantly evaded. Debtors, under the force of pressing necessities, will submit to almost any exactions for loans of a trifling amount compared with the value of the property, and the equity of redemption will elude the grasp of the court, and rest in the simple good faith of the creditor. A mortgage, as I have observed, is in form a conveyance of the conditional estate, and the assertion of a right to redeem from a for-

declares these to be the true grounds for the admission of parol evidence to show that a deed absolute in its terms is in fact a mortgage.

It is declared by statute that every transfer of an interest in real estate, other than in trust made only as a security for the performance of another act, is to be deemed a mortgage deed.¹ The fact that the transfer was made subject to defeasance may be proved, though it does not appear by the terms of the instrument.

288 a. In Colorado the Code provides that a deed may be proved by oral testimony to be in effect a mortgage.²

289. In Connecticut the court in a recent case seemed to regard it as an undecided question whether parol evidence is admissible to show that an absolute deed is a mortgage.³ In early cases it was held that such evidence was inadmissible in courts of law, either as between the parties or between third persons.⁴ An absolute deed may be shown to be a mortgage by evidence from any paper signed by the grantee, showing that the deed was given as security only.⁵ In equity parol evidence seems to have been admitted to show that the defeasance was omitted by fraud or mistake.⁶

290. Dakota Territory. — It is provided that every transfer of an interest in real estate not in trust made as a security for the performance of another act is to be deemed a mortgage; and the fact that the transfer was made subject to defeasance may

feiture involves the same departure from the terms of the instrument, as in the case of an absolute conveyance executed as security. The conveyance upon condition by its terms purports to vest the entire estate upon the breach of the condition, just as the absolute conveyance does in the first instance. The equity arises and is asserted, in both cases, upon exactly the same principles, and is enforced without reference to the agreement of the parties, but from the nature of the transaction to which the right attaches, from the policy of the law, as an inseparable incident."

And see, also, *Johnson v. Sherman*, 15 Cal. 287, 291; *Lodge v. Turman*, 24 Cal. 385, 390; *Cunningham v. Hawkins*, 24 Cal. 403; *Gay v. Hamilton*, 33 Cal. 686; *Hopper v. Jones*, 29 Cal. 18; *Jackson v. Lodge*, 36 Cal. 28; *Vance v. Lincoln*, 38

Cal. 586; *Farmer v. Grose*, 42 Cal. 169; *Raynor v. Lyons*, 37 Cal. 452; *Kuhn v. Rumpp*, 46 Cal. 299; *Montgomery v. Spect*, 55 Cal. 352.

¹ Civil Code, 1872, §§ 2924, 2925, and amendment 1874, p. 260.

² Civil Code, 1877, § 243.

³ *Osgood v. Thompson Bank*, 30 Conn. 27.

⁴ *Reading v. Weston*, 8 Conn. 117; *S. C. 7* *Ib.* 143, 149; *Benton v. Jones*, 8 Conn. 186.

⁵ *Belton v. Avery*, 2 Root (Conn.), 279; *French v. Lyon*, *Ib.* 69.

⁶ *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alvord*, 2 Root, 196; *Collins v. Tillou*, 26 Conn. 368; *Bacon v. Brown*, 19 Conn. 29; *Jarvis v. Woodruff*, 22 Conn. 548; *Mills v. Mills*, 26 Conn. 213; *French v. Burns*, 35 Conn. 359; *Brainerd v. Brainerd*, 15 Conn. 575.

be proved, except as against a subsequent purchaser or incumbrancer for value and without notice, though it does not appear by the terms of the instrument.¹

291. In Florida it is provided that all conveyances securing the payment of money shall be deemed mortgages. This statute, however, does not change the rule as to the admission of parol evidence to show that a deed absolute on its face was intended as a mortgage; but some ground for equitable interference must be shown, such as fraud, accident, or mistake in the execution of the instrument.²

292. In Georgia it is provided by statute that a deed absolute on its face, accompanied with possession of the property, shall not be proved, at the instance of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried;³ Such a deed passes the legal title, and enables the grantee to recover possession by ejectment, although a formal mortgage does not.⁴ It may, nevertheless, be used as security for a debt.⁵ "It does not follow, because a mortgage is only security, that every security is only a common mortgage."⁶ The grantor in possession may defend his possession by pleading an equitable plea and doing equity; that is, tendering the debt and interest. When the deed has served its purpose, that is, when the debt is discharged, the facts having been established by competent evidence, the creditor will be compelled to reconvey.

¹ Civil Code, 1877, §§ 1724, 1726.

² *Chaires v. Brady*, 10 Fla. 133 (1863); *Matthews v. Porter*, 16 Fla. 466; *Lindsay v. Matthews*, 17 Fla. 575.

"This question," says Du Pont, C. J., "has been a fruitful source of litigation in the courts of the country, and there has been great diversity and contradiction in the adjudications of the several states constituting the late Union. In some of them any evidence going to show the intention of the parties is admissible to fix the character of the instrument; while in others it is held that such evidence only as tends to show fraud, accident, mistake, or trust will be permitted. We are not aware that there has been any authoritative adjudication of the question in this state, and it is now presented to us as one of first impression. The theory upon which the former class of adjudications

proceed is, that the fact of a deed being given as security determines its character, and not the evidence of the fact. Also, that parol evidence that a deed is a mortgage is not heard in contradiction of the deed, but in explanation of the transaction to prevent the perpetration of fraud by the mortgagee."

³ § 26; Code, 1873, p. 669; and see *Spence v. Steadman*, 49 Ga. 133, 139; *Keith v. Catchings*, 64 Ga. 773. But it may be shown by such evidence to be a mortgage in a contest between general creditors of the mortgagor and his widow claiming dower in the property. *Carter v. Hallahan*, 61 Ga. 314.

⁴ Code, § 1969.

⁵ *Broach v. Barfield*, 57 Ga. 601, 604; *Carter v. Gunn*, 64 Ga. 651.

⁶ *Biggers v. Bird*, 55 Ga. 650, 652.

He is treated as holding the title solely in trust for his former debtor.¹

293. In Illinois it is provided by statute that every deed of real estate intended as security, though absolute in terms, shall be considered as a mortgage.² In order to change an absolute sale into a mortgage, the evidence must clearly show the intention of parties to make a mortgage. Slight evidence is not sufficient. An absolute sale is valid if intended. To overcome the express terms of the deed, a debt must exist, and the liability to pay it. The kind of parol evidence which is properly receivable to show an absolute deed to be a mortgage is that of facts and circumstances of such a nature as, in a court of equity, will control the operation of a deed, and not of loose declarations of parties touching their intentions or understanding. The latter is a dangerous species of evidence upon which to disturb the title to land, being extremely liable to be misunderstood or perverted. If the papers show upon their face a conditional sale, or a sale and agreement for repurchase, to make the transaction a mortgage the evidence must do more than create a doubt as to the character of the transaction.³

Evidence of fraud, or undue advantage or oppression, is allowed, as tending to show that an absolute conveyance should be regarded as a mortgage.⁴ If the fact be established by parol evidence that there was a loan of money, equity regards the deed as a security for the repayment of the money loaned.⁵ To es-

¹ *Biggers v. Bird*, *supra*; *Lackey v. Bostwick*, 54 Ga. 45.

² R. S. 1874, p. 713; R. S. 1880, p. 922, § 12.

³ *Klock v. Walter*, 70 Ill. 416, and cases cited; *Remington v. Campbell*, 60 Ill. 516; *Wilson v. McDowell*, 78 Ill. 514; *Dwen v. Blake*, 44 Ill. 135; *Heald v. Wright*, 75 Ill. 17; *Taintor v. Keys*, 43 Ill. 332; *Price v. Karnes*, 59 Ill. 276; *Alwood v. Mansfield*, 59 Ill. 496; *Shays v. Norton*, 48 Ill. 100; *Christie v. Hale*, 46 Ill. 117, 120; *Hunter v. Hatch*, 45 Ill. 178; *Pitts v. Cable*, 44 Ill. 103; *Parmelee v. Lawrence*, 44 Ill. 405; *Ewart v. Walling*, 42 Ill. 453; *Silsbe v. Lucas*, 36 Ill. 462; *Lindauer v. Cummings*, 37 Ill. 195; *Sutphen v. Cushman*, 35 Ill. 186; *Roberts v. Richards*, 36 Ill. 339; *Reigard v. McNeil*, 38 Ill. 400; *Snyder v. Griswold*, 37

Ill. 216; *Preschbaker v. Feaman*, 32 Ill. 475; *Ennor v. Thompson*, 46 Ill. 214; *Weider v. Clark*, 27 Ill. 251; *Maxfield v. Patchen*, 29 Ill. 39; *Shaver v. Woodward*, 28 Ill. 277; *De Wolf v. Strader*, 26 Ill. 225; *Tillson v. Moulton*, 23 Ill. 648; *Davis v. Hopkins*, 15 Ill. 519; *Smith v. Cremer*, 71 Ill. 185; *Coates v. Woodworth*, 13 Ill. 654; *Miller v. Thomas*, 14 Ill. 428; *Magnusson v. Johnson*, 73 Ill. 156; *Strong v. Shea*, 83 Ill. 575; *Westlake v. Horton*, 85 Ill. 228; *Sharp v. Smitherman*, 85 Ill. 153; *Hancock v. Harper*, 86 Ill. 445; *Knowles v. Knowles*, 86 Ill. 1; *Clark v. Finlon*, 90 Ill. 245.

⁴ *Brown v. Gaffney*, 28 Ill. 149.

⁵ *Wynkoop v. Cowing*, 21 Ill. 570; *Williams v. Bishop*, 15 Ill. 553, 555; *S. C.* 18 Ill. 101; *Smith v. Sackett*, 15 Ill. 528, 530; *Davis v. Hopkins*, 15 Ill. 519.

tablish this fact, a parol agreement that the land conveyed should be held by the grantee as security for money loaned the grantor, or paid for his benefit, may be proved;¹ or that it should be held to indemnify the grantee for moneys to be paid by him on the debts of the grantor.² In short, any evidence is admissible which tends to show the relations between the parties, or to show any other fact or circumstance of a nature to control the deed, and establish such an equity as would give a right of redemption.³

294. Indiana. — The admission of parol evidence to show that an absolute deed was executed merely as security for the

¹ *Reigard v. McNeil*, 38 Ill. 400.

² *Roberts v. Richards*, 36 Ill. 339.

³ *Sutphen v. Cushman*, 35 Ill. 186.

Mr. Justice Beckwith states very clearly the rule governing the admission of parol evidence in such cases: "In determining whether the transaction consummated by the deed in question was an absolute sale or should be regarded merely as a mortgage, we entirely disregard the testimony of those witnesses introduced for the purpose of establishing their understanding of the nature of the transaction, and who relate conversations of the parties. The conveyance purports to convey an absolute estate to the grantee, and it must be taken as the exponent of the rights of the parties, unless some equity is shown, not founded on the mere allegation of a contemporaneous understanding inconsistent with the terms of the deed, but independently both of the deed itself and of the understanding with which it was executed. The right to redeem lands conveyed cannot be established by simply proving that such was the understanding on which the deed was executed, because equity, as well as the law, will seek for the understanding of the parties in the deed itself. The right must be one paramount to, and independent of, the terms of the deed, as well as of the understanding between the parties at the time it was executed. Parol evidence is admissible so far as it conduces to show the relations between the parties, or to show any other fact or circumstance of a nature to control the deed, and to establish such an equity as would give a

right of redemption, and no further. In the application of this rule, parol evidence is received to establish the fact that a debt existed, or money was loaned on account of which the conveyance was made; for such facts will, in a court of equity, control the operation of the deed. So, too, in regard to any other fact or circumstance having the same operation. From some expressions of opinion in cases hitherto decided by this court, it has been supposed that a more enlarged rule has been adopted in this state, but a careful examination of them will show that this court has never departed from the rule we now enunciate."

The ground or principle of the doctrine was also considered in *Ruckman v. Alwood*, 71 Ill. 155, where, after referring to the earlier cases in this state, the court say: "It will be perceived that in none of these cases did the court attempt to range the jurisdiction to turn an absolute deed into a mortgage by parol evidence, under any specific head of equity, such as fraud, accident, or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee."

payment of money or the performance of some act, is a well settled rule in this state.¹ The ground on which it is received seems to be fraud or mistake; and the attempt to set up such a deed as an absolute conveyance seems to be regarded in itself as a fraud. The proof that a mortgage was intended must be clear and decisive.²

295. In Iowa parol evidence is admissible, on the ground that to declare that to be a sale which was really a mortgage would be a fraud.³ Such evidence is not admitted to contradict or vary the written deed, but, as an exception to the rule, to show the intention of the parties. The burden of proving that a mortgage was intended is upon the party seeking to establish it as such, and the proof must be clear, satisfactory, and conclusive,⁴ and even then the evidence is received with caution. Inadequacy of the consideration paid is a strong circumstance to support the claim that the conveyance was intended to operate as a mortgage; and the fact that the grantor remains in possession is also to be considered in determining this question.⁵ The condition and conduct of the parties, and all the surrounding circumstances, will be weighed.

296. In Kansas it is declared that, although such evidence may not be admissible at law, it is in equity. Although no written defeasance was ever executed between the parties, their understanding, intention, or agreement may be shown to create a parol defeasance. The mortgage results from the facts of the case, and the statute of frauds and the statute relating to trusts, while making void parol agreements respecting land, do not make void an estate which results from, or is created by, operation of law. This evidence is admitted to show the facts of the case,

¹ *Heath v. Williams*, 36 Ind. 495; *Davis v. Stonestreet*, 4 Ind. 101; *Smith v. Parks*, 22 Ind. 59; *Hayworth v. Worthington*, 5 Blackf. 361; *Blair v. Bass*, 4 Ib. 539; *Harbison v. Lemon*, 3 Ib. 51; *Conwell v. Evill*, 4 Ib. 67; *Cross v. Hepner*, 7 Ind. 359; *Crane v. Buchanan*, 29 Ind. 570; *Graham v. Graham*, 55 Ind. 23; *Butcher v. Stultz*, 60 Ind. 170.

² *Conwell v. Evill*, *supra*.

³ *Roberts v. McMahan*, 4 Greene (Iowa), 34; *Johnson v. Smith*, 39 Iowa, 549; *Berberick v. Fritz*, 39 Iowa, 700.

⁴ *Zuver v. Lyons*, 40 Iowa, 510; *Cor-*

bit v. Smith, 7 Iowa, 60; *Hyatt v. Cochran*, 37 Iowa, 309; *Crawford v. Taylor*, 42 Iowa, 260; *Gardner v. Weston*, 18 Iowa, 533; *Green v. Turner*, 38 Iowa, 112; *Wilson v. Patrick*, 34 Iowa, 362; *Key v. McCleary*, 25 Iowa, 191; *Childs v. Griswold*, 19 Iowa, 362; *Sunderland v. Sunderland*, 19 Iowa, 325; *Cooper v. Skeel*, 14 Iowa, 578; *Atkins v. Faulkner*, 11 Iowa, 326; *Noel v. Noel*, 1 Iowa, 423; *Holliday v. Arthur*, 25 Iowa, 19; *Woodworth v. Carman*, 43 Iowa, 504.

⁵ *Wilson v. Patrick*, 34 Iowa, 362; *Trucks v. Lindsey*, 18 Iowa, 504.

which render the deed defeasible.¹ The deed may be declared a mortgage not only upon the application of the grantor, but also upon application of his creditors who seek to reach his interest by attachment.²

297. Kentucky. — Parol evidence is admitted in this class of cases upon the ground of fraud or mistake.³ Especially if the transaction be infected with usury, it is admissible to show that the real character of the transaction is different from what it purports to be.⁴

298. In Maine, by statutory definition, mortgages of real estate include those made in the usual form in which the condition is set forth in the deed, and those made by a conveyance appearing on its face to be absolute, with a separate instrument of defeasance executed at the same time, or as part of the same transaction.⁵ Parol evidence is not admissible at law to convert an absolute deed into a mortgage.⁶ But in equity a resulting trust has been held to arise in favor of a grantor who has conveyed land by an absolute deed to secure a debt due to the grantee, under which redemption may be had within a reasonable time.⁷ In the latest case upon this subject the court said "it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud."⁸

299. Maryland. — Parol evidence is admitted only to show that the defeasance was omitted or destroyed by fraud or mistake.⁹ The fraud may be inferred from the facts and circumstances of the case, from the character of the contract, or from the condition of the parties.¹⁰

300. In Massachusetts parol evidence is admitted in such

¹ *Moore v. Wade*, 8 Kans. 380; *Glynn v. Home Building Asso.* 22 Kans. 746.

² *Bennett v. Wolverton*, 24 Kansas, 284.

³ *Skinner v. Miller*, 5 Litt. 84, 86; *Blanchard v. Kenton*, 4 Bibb, 451.

⁴ *Murphy v. Trigg*, 1 Mon. 72; *Lindley v. Sharp*, 7 Ib. 248; *Cook v. Colyer*, 2 B. Mon. 71; *Stapp v. Phelps*, 7 Dana, 296.

⁵ Rev. Stat. 1871, c. 90, § 1.

⁶ *Bryant v. Crosby*, 36 Me. 562; *Ellis v. Higgins*, 32 Me. 34; *Thomaston Bank v. Stimpson*, 21 Me. 195.

⁷ *Richardson v. Woodbury*, 43 Ma. 206;

and see *Howe v. Russell*, 36 Me. 115; *Whitney v. Batchelder*, 32 Me. 313.

⁸ *Stinchfield v. Milliken*, 71 Me. 567.

⁹ *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; S. C. 3 Ib. 608; *Farrell v. Bean*, 10 Md. 217; *Bend v. Susquehanna Bridge & Bank Co.* 6 H. & J. 128; *Artz v. Grove*, 21 Md. 456, 474; *Dougherty v. McColgan*, 6 G. & J. 275; *Baughner v. Merryman*, 32 Md. 185; and see *Price v. Gover*, 40 Md. 102.

¹⁰ *Thompson v. Banks*, 2 Md. Ch. 430; *Brogden v. Walker*, 2 H. & J. (Md.) 285; *Watkins v. Stockett*, 6 Ib. 435; *Thompson v. Banks*, 3 Md. Ch. 138.

cases not to vary, add to, or contradict the deed, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the deed by restraining its operation or defeating it altogether.¹ This doctrine is regarded as a sound and salutary principle of equity jurisprudence, when properly administered; but it is declared to be a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt. "It is not enough," says Mr. Justice Wells, "that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed."²

Dissent is expressed in the opinion of the court already quoted from the doctrine advanced in some of the cases, that the subse-

¹ *Campbell v. Dearborn*, 109 Mass. 130; and see *Newton v. Fay*, 10 Allen, 505; *Glass v. Hulbert*, 102 Mass. 24; *Pond v. Eddy*, 113 Mass. 149; *McDonough v. Squire*, 111 Mass. 217; *McDonough v. O'Neil*, 113 Mass. 92. Prior to the statute of 1855, c. 194, § 1, Gen. Stat. c. 113, § 2, conferring upon the Supreme Judicial Court jurisdiction in equity, "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages," the jurisdiction of the court in relation to the foreclosure and redemption of mortgages was confined to cases of a defeasance contained in the deed or in some other instrument under seal. *Eaton v. Green*, 22 Pick. 526; *Flagg v. Mann*, 14 Pick. 467, 478; *Lincoln v. Parsons*, 1 Allen, 388; *Coffin v. Loring*, 9 Allen, 154; *Flint v. Sheldon*, 13 Mass. 443; *Stackpole v. Arnold*, 11 Mass. 27; *Kelleran v. Brown*, 4 Mass. 443; *Boyd v. Stone*, 11 Mass. 442; *Bodwell v. Webster*, 13 Pick. 411, 413; *Saunders v. Frost*, 5 Pick. 259. But before that statute parol evidence had been frequently admitted where there was a deed and a provision

for a reconveyance, to show the real nature of the transaction; and had construed the instruments as constituting a mortgage when it was shown that the transaction was really and essentially a loan of money. *Flagg v. Mann*, 14 Pick. 467, 478; *Rice v. Rice*, 4 Pick. 349; *Parks v. Hall*, 2 Pick. 206, 211; *Carey v. Rawson*, 8 Mass. 159; *Taylor v. Weld*, 5 Mass. 109; *Kelleran v. Brown*, 4 Mass. 443; *Erskine v. Townsend*, 2 Mass. 493. But the question, whether in the absence of any written defeasance an absolute deed could be converted into a mortgage, or restricted in its operation so as to allow a redemption, when shown to be in fact merely security for a loan, was not decided until it came before the court in *Campbell v. Dearborn*, *supra*, though the question had been discussed in *Newton v. Fay*, 10 Allen, 505, and, so far as concerned the statute of frauds, in *Glass v. Hulbert*, 102 Mass. 24. The opinion of Mr. Justice Wells, in *Campbell v. Dearborn*, contains a full and able discussion of the whole subject.

² In *Campbell v. Dearborn*, *supra*, 143.

quent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which afford ground of jurisdiction and judicial interference. "There can be no fraud, or legal wrong, in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit."¹ The fault is in the original transaction rather than in the grantee's subsequent conduct in relation to it. As between borrower and lender, or debtor and creditor, an absolute deed given as security, and a renunciation of all legal right of redemption, are regarded as so significant of oppression, and so calculated to invite to or result in wrong and injustice on the part of the stronger towards the weaker party in the transaction, as in themselves to constitute a *quasi* fraud against which equity ought to relieve, — in the same way that it does against the strict letter of an express condition of forfeiture.²

301. Michigan. — Parol evidence is admissible to convert an absolute deed into a mortgage.³ It is admitted to show the intention of the parties in the transaction, but whether as an exception under the statute of frauds, or upon the ground of fraud, the court in one case expressly leave undetermined;⁴ but in another it is said, that neither the statute of frauds, nor the statute requiring powers and trusts to be created in writing, is encroached upon by a court of equity in exercising its jurisdiction in this class of cases; that a different construction would make them what they were never intended to be, — a shield for the protection of oppression and fraud; that the court will interfere between creditor and debtor to prevent oppression; and that to give relief in such cases has ever been the province of courts of equity, whose chief excellence consists in a wise and judicious exercise of this part of their jurisdiction.⁵

302. Minnesota. — Parol evidence is admissible in equity of the circumstances under which the deed was made, and the re-

¹ Campbell v. Dearborn, *supra*, 140.

Emerson v. Atwater, 7 Mich. 12; Barber

² Per Wells, J., in Hassam v. Barrett, 115 Mass. 256.

v. Milner, 43 Mich. 248.

⁴ Fuller v. Parrish, 3 Mich. 211.

³ Swetland v. Swetland, 3 Mich. 482; Wadsworth v. Lorranger, Har. Ch. 113;

⁵ Emerson v. Atwater, *supra*.

lation subsisting between the parties.¹ At first it was held to be admissible only upon the ground of fraud, mistake, or surprise in making or executing the instrument; but, subsequently, it was held to be admissible to show the real character of the transaction. In a court of law, such evidence cannot be received on any ground.²

303. In Mississippi it is well settled that parol evidence will be admitted in equity to show that an absolute deed was intended to be a security for money, and therefore a mortgage.³ It is received to explain the true character of the transaction. For this purpose, the conduct of the parties at the time and subsequently, and all the attending circumstances, may be looked at; and when it is shown that the consideration of the conveyance was a loan or a debt, the courts always incline to regard it as a mortgage.⁴

304. Missouri. — A conveyance intended as a security, though absolute in form, is treated as a mortgage. Such intention may be shown by parol evidence, on the ground that the denial of the trust character of the deed by the grantee is a fraud on his part, which gives a court of equity jurisdiction of the case, and thus enables it to hold to the verbal or implied defeasance as effectually as if this had been a formal written one.⁵ It is not admissible at law.⁶

305. In Nebraska a formal conveyance may be shown to be a mortgage by extrinsic evidence. "This rule seems to be founded on the principle, that in such case the proof raises an equity, which does not contradict the writing or affect its validity, but simply varies its import so far as to show the true intention and object of the parties without a written defeasance, and establish the trust purpose for which the deed was executed. But to thus vary the legal import of such absolute deed, and especially when fraud, accident, mistake, or surprise is not alleged, the evidence

¹ *Weide v. Gehl*, 21 Minn. 449; *Phoenix v. Gardner*, 13 Minn. 430.

² *McClane v. White*, 5 Minn. 178; keeping within the statute of frauds. *Belote v. Morrison*, 8 Minn. 87.

³ *Klein v. McNamara*, 54 Miss. 90; *Littlewort v. Davis*, 50 Miss. 403, and cases cited; *Freeman v. Wilson*, 51 Miss. 329, and cases cited; *Vasser v. Vasser*, 23 Miss. 378; *Soggins v. Heard*, 31 Miss. 426; *Anding v. Davis*, 38 Miss. 574, 594;

Weathersly v. Weathersly, 40 Miss. 462, 469; *Prewett v. Dobbs*, 13 Sm. & M. 431, 440; *Watson v. Dickens*, 12 Ib. 608.

⁴ *Freeman v. Wilson*, *supra*.

⁵ *O'Neill v. Capelle*, 62 Mo. 202; and see *Slowey v. McMurray*, 27 Mo. 113, 116; *Tibean v. Tibean*, 22 Mo. 77; *Hogel v. Lindell*, 10 Mo. 463; *Johnson v. Huston*, 17 Mo. 58; *Wilson v. Drumrite*, 21 Mo. 325.

⁶ *Hogel v. Lindell*, 10 Mo. 483.

in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear, certain, and conclusive, before a court of chancery will determine such writing to be a mortgage security only."¹

306. In Nevada a conveyance absolute upon its face may be shown by parol to be a mortgage. It is not received to contradict the deed but to prove an equity superior to it.² The proof on the part of the plaintiff must be clear, satisfactory, and convincing. The presumption is in favor of the natural effect of the instrument. The evidence to overcome such presumption should be so cogent, weighty, and convincing as to leave no doubt upon the mind.³

307. In New Hampshire it is provided by statute that no conveyance in writing of any lands shall be defeated, nor any estate incumbered by any agreement, unless it is inserted in the condition of the conveyance, and made part thereof, stating the sum of money to be secured, or other thing to be performed.⁴ But a proviso that if the grantor comply with the conditions of a bond executed by him to the grantee at the same time, the deed shall be void, sufficiently sets forth the thing to be done.⁵

Under this statute a parol agreement entered into between the grantor and grantee at the time of the delivery of the deed that the grantee should give a bond to reconvey, even after a bond is subsequently given in pursuance of such agreement, does not make the conveyance a mortgage.⁶ Even a bond executed at the same time with the conveyance, providing that the conveyance shall be void upon payment of a certain sum of money, does not constitute a mortgage. The defeasance must be inserted in the deed itself; and a deed without such defeasance confers an absolute title upon the grantee.⁷

308. In New Jersey. — The efficacy of the parol evidence is not to establish an agreement to reconvey, the specific performance of which a court of equity will enforce, but to establish the true nature and effect of the instrument by showing the object

¹ *Schade v. Bessinger*, 3 Neb. 140; and see *Wilson v. Richards*, 1 Neb. 342; *De-roin v. Jennings*, 4 Neb. 97.

² *Cookes v. Culbertson*, 9 Nev. 199; *Saunders v. Stewart*, 7 Nev. 200; *Carlyon v. Lannan*, 4 Nev. 156, 159.

³ *Bingham v. Thompson*, 4 Nev. 224; *Pierce v. Traver*, 13 Nev. 526.

⁴ G. S. c. 122, § 2; Stat. 1867; G. L.

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1878, c. 136, § 2; Stat. July 3, 1829; *Boody v. Davis*, 20 N. H. 140.

⁵ *Bassett v. Bassett*, 10 N. H. 64.

⁶ *Porter v. Nelson*, 4 N. H. 130; *Clark v. Hobbs*, 11 N. H. 122; *Boody v. Davis*, *supra*; *Runlet v. Otis*, 2 N. H. 167; *Lund v. Lund*, 1 N. H. 39.

⁷ *Tift v. Walker*, 10 N. H. 150.

for which it was made. It is well settled that this may be done.¹ The question in every case is, whether the transaction was a sale and conveyance, coupled with an agreement for a reconveyance, or whether it was a security for a loan. "Any means of proof may be used to show it to be the latter: the declaration of the parties; the relations subsisting between them; the possession of the premises retained by the complainant; the value of the property, compared with the money paid; the understanding that the sums advanced should be repaid; and the payment of interest meanwhile on the amount. The distinction between parol evidence to vary a written instrument and parol evidence showing facts which control its operation is employed to reconcile the allowance of such proofs with the statute of frauds and the general rule of common law. Deeds absolute on their face have been frequently decreed to be mortgages by this court, and the grantors allowed to redeem."²

309. In *New York*. — Such evidence was admitted in some of the earlier cases solely upon the ground of fraud or mistake.³ But Chancellor Kent apparently thought the only fraud necessary to be shown to be the fraud on the part of the grantee in attempting to convert a mortgage into an absolute sale;⁴ and it is distinctly asserted in other cases that it is not necessary to prove that the deed was given in this form through fraud or mistake.⁵ This evidence is admitted in all cases without reference to the reason why a written defeasance was omitted, or why the grantee denies the redeemable character of the conveyance. It is admitted to show what the transaction really was.⁶

¹ *Budd v. Van Orden*, 33 N. J. Eq. 143; *Sweet v. Parker*, 22 N. J. Eq. 453, 457; *Crane v. Decamp*, 21 N. J. Eq. 414; *Crane v. Bonnell*, 1 Green Ch. 264; *Youle v. Richards*, Sax. Ch. 534; *Lokerson v. Stillwell*, 13 N. J. Eq. 357; *Condit v. Tichenor*, 19 N. J. Eq. 43; *Vandegrift v. Herbert*, 18 N. J. Eq. 466.

² Per Vice Chancellor Dodd, in *Sweet v. Parker*, *supra*; and see *Phillips v. Hulsizer*, 20 N. J. Eq. 308.

³ *Patchin v. Pierce*, 12 Wend. 61; *Swart v. Service*, 21 Wend. 36; *Stevens v. Cooper*, 1 Johns. Ch. 425; *Strong v. Stewart*, 4 Ib. 167; *Marks v. Pell*, 1 Ib. 594; *Taylor v. Baldwin*, 10 Barb. 582; *Webb v. Rice*, 6 Hill, 219. In the latter case it was held that such evidence is inadmis-

sible at law, and earlier cases at law in which it had been admitted were overruled.

⁴ *Strong v. Stewart*, 4 Johns. Ch. 167.

⁵ *Brown v. Clifford*, 7 Lans. 46, per Mr. Justice Mullin: "I have said that parol evidence was admissible, although no fraud or mistake in making the deed was alleged or proved, and I say this, because in nearly all of the cases cited, and in the numerous others upon the same point, no fraud or mistake was either alleged or proved, nor was any suggestion made that any such allegation or proof was necessary to justify the court in admitting the parol evidence."

⁶ *Horn v. Keteltas*, 46 N. Y. 605, 609.

"It is now too late," says Mr Justice

310. North Carolina. — Parol evidence seems to be admitted upon the general grounds of equity jurisdiction in cases of fraud, accident, and mistake.¹ “In equity, plaintiffs are allowed, by

Allen, delivering the judgment in this case, “to controvert the proposition that a deed, absolute upon its face, may in equity be shown, by parol or other extrinsic evidence to have been intended as a mortgage; and fraud or mistake in the preparation, or as to the form of the instrument, is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this state are fully committed to the doctrine; and whatever may be the rule in other states, here, in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact that the adjudications have entered into and controlled business transactions and become a rule of property, to authorize a reconsideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests, the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from.”

The learned judge refers to the earlier cases in New York, saying: “The principle was recognized by the Chancellor in *Holmes v. Grant*, 8 Paige, 243, although it was not applied in that case; and had been before asserted under like circumstances in *Robinson v. Cropsey*, 2 Edw. 138; affirmed 6 Paige, 480.

“It was expressly adjudged in *Strong v. Stewart*, 4 Johns. Ch. 167, that parol evidence was admissible to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is *Clark v. Henry*, 2 Cow. 324; which was followed by this court in *Murray v. Walker*, 31 N. Y. 399. In *Hodges v. Tennessee Marine & Fire Insurance Co.* 8 N. Y. 416, the court says that ‘from an early day in this state the rule, that parol evidence is admissible for the pur-

pose named, has been established as the law of our courts of equity, and it is not fitting that the question should be reexamined, and the cases in which it has been so adjudged are cited with approval.’

“In *Sturtevant v. Sturtevant*, 20 N. Y. 39, the same judge pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust; and it was decided, that while a deed absolute in terms could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see *Despard v. Walbridge*, 15 N. Y. 374. The rule does not conflict with that other rule which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid, whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties.”

And see *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Marks v. Pell*, Ib. 594, 599; *Clark v. Henry*, 2 Cow. 324, 332; *Whitlick v. Kane*, 1 Paige, 202, 206; *Van Buren v. Olmstead*, 5 Paige, 9, 10; *McIntyre v. Humphreys*, 1 Hoff. 31, 34; *Hodges v. Tennessee Marine & F. Ins. Co.* 8 N. Y. 416; *Despard v. Walbridge*, 15 N. Y. 374; *Sturtevant v. Sturtevant*, 20 N. Y. 39; *Van Dusen v. Worrell*, 4 Abb. App. Dec. 473; *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251; *S. C. 4 Lans. 314*; *Meehan v. Forrester*, 52 N. Y. 277; *Brown v. Clifford*, 7 Lans. 46; *Loomis v. Loomis*, 60 Barb. 22; *Fiedler v. Darrin*, 50 N. Y. 437; *Odell v. Montross*, 68 N. Y. 499.

¹ *McDonald v. McLeod*, 1 Ired. Eq. 221; *Steel v. Black*, 3 Jones Eq. 427; *Cook v. Gudger*, 2 Ib. 172; *Glisson v. Hill*, 2 Ib. 256; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Elliott v. Maxwell*, 7 Ib. 246;

making the proper preliminary allegations, — as that a certain clause was intended to be inserted in a written instrument, but was omitted by the ignorance or mistake of the draughtsman; or by some fraud or circumvention of the opposite party; or some oppression or advantage taken of the plaintiff's necessities; or when an unlawful trust was designedly omitted to evade the law, — to call for a discovery on the oath of the defendant. If the fact is confessed, the plaintiff can have relief. If it be denied, although it was for a long time questioned, it is now settled that, provided the matter can be established, not merely by the declarations of the parties or the unaided memory of the witnesses, but by facts and circumstances *dehors* the instrument, such as are more tangible and less liable to be mistaken than mere words, equity will give relief, by considering the clause thus shown to have been omitted as if it had been set out in the instrument.”¹ Thus, where there was the preliminary allegation of oppression to account for the omission of the defeasance, and it was shown that the plaintiff was hard pressed for money, and was forced to consent to the omission of this clause; and it was further shown that there was great inadequacy of price, and that the plaintiff retained possession and paid interest, he was allowed to redeem.² The grantor having executed a deed, knowing it to be absolute, must be deemed to have intended it to be so, unless there is strong and clear proof of mistake or imposition.³ Parol evidence of admissions on the part of the grantee that the deed was intended as a mere security are not alone sufficient. There must also be shown facts or circumstances inconsistent with the idea of an absolute conveyance, and proof of fraud, oppression, ignorance, or mistake, so as to account for the conveyance being absolute on its face, when such was not the intention.⁴

311. Ohio. — Parol evidence is admitted to show whether an absolute deed be a mortgage or not. If given as a security it is a mortgage, whatever its form; and the fact of its being so given, and not the evidence of the fact, determines its character. In such case a trust arises in favor of the grantor. Being a tacit trust, it is more difficult to establish than one that is expressed,

Blackwell v. Overby, 6 Ib. 38; Kelly v. Bryan, 6 Ib. 283; M'Laurin v. Wright, 2 Ib. 94.

¹ Kelly v. Bryan, 6 Ired. Eq. 283, per Pearson, J.

² Streator v. Jones, 3 Hawks, 423; 1 Murph. 449.

³ Elliott v. Maxwell, 7 Ired. Eq. 246.

⁴ Brothers v. Harrill, 2 Jones Eq. 209; Cook v. Gudger, Ib. 172; Gliason v. Hill, Ib. 256.

but when it is ascertained, the same consequences attach to it. The evidence for this purpose must be clear, certain, and conclusive.¹

311 *a*. Oregon. — Parol evidence is admissible to show that a deed absolute on its face was intended to operate as a mortgage.²

312. Pennsylvania. — The courts of this state have no general equity jurisdiction. Mortgages are dealt with as matters of strict law; and yet parol evidence, under restrictions as to its sufficiency, is admitted to show that an absolute conveyance is in fact a mortgage.³ "In strict law," says Chief Justice Lowrie, "no mortgage is allowed that is not proved by written evidence, and the judge may not admit any lower evidence on equitable grounds without seeing that justice imperiously demands it. The case of a lost instrument is a useful analogy. If, in such a case, the judge refuses to hear secondary evidence until he is perfectly satisfied that the justice of the case cannot be otherwise administered, much more, it would seem, ought this to be so where the evidence which the law makes, not merely primary but essential, never had any existence."⁴ Therefore, it is held that mere evidence of verbal declarations by the parties, unless corroborated by other facts and circumstances, is not a proper substitute for the written evidence required by law.⁵ The presumption always is that the deed is what it purports to be. To prove it otherwise, the evidence must be clear and convincing. If the intention of the parties be to create a mortgage rather than a conveyance, this must

¹ *Miami Exporting Co. v. Bank of U. S. Wright*, 249, 252; *Cotterell v. Long*, 20 Ohio, 464; and see *Miller v. Stokely*, 5 Ohio St. 194; *Stall v. City of Cincinnati*, 16 Ib. 169.

² *Hurford v. Harned*, 6 Oregon, 362.

³ *Odenbaugh v. Bradford*, 67 Pa. St. 96; *Kenton v. Vandergrift*, 42 Pa. St. 339; *Kellum v. Smith*, 33 Pa. St. 158; *Todd v. Campbell*, 32 Pa. St. 250; *Kunkle v. Wolfersberger*, 6 Watts, 126, 130; *Kerr v. Gilmore*, 6 Ib. 405, 414; *Kelly v. Thompson*, 7 Ib. 401; *Jaques v. Weeks*, 7 Ib. 261, 268; *Friedley v. Hamilton*, 17 S. & R. 70; *Manufacturers' & Mechanics' Bank v. Bank of Penn.* 7 W. & S. 335; *Cole v. Bolard*, 22 Pa. St. 431; *Houser v. Lamont*, 55 Pa. St. 311; *Guthrie v. Kahle*, 46 Pa. St. 331; *Harper's Appeal*, 64 Ib. 315; *S. C. 7 Phila.* 276; *Rhines v. Baird*,

41 Ib. 256; *McClurkan v. Thompson*, 69 Ib. 305; *Fessler's Appeal*, 75 Ib. 483.

⁴ *De France v. De France*, 34 Pa. St. 385. "Equitable principles are continually insinuating themselves into the system of the law. Our law abounds with principles that were formerly purely equitable. And the process by which this takes place is perfectly natural; for, in the progress of society, and in the natural changes of its customs, exceptional principles are constantly demanding recognition, and continually enlarging their sphere, until they become general, and thus truly legal. In this way the social system keeps pace with the changes of social purposes and principles, and never requires any violent disruption." Per Lowrie, C. J.

⁵ *Todd v. Campbell*, 32 Pa. St. 250; *De France v. De France*, *supra*.

be established, not merely by loose conversations between the parties, or by declarations to third persons, but by facts and circumstances outside the deed, inconsistent with the idea of an absolute purchase.¹ The principle upon which parol evidence is admitted is to show and explain the true intention and purpose of the parties, in order to develop the real character of the transaction.² Whether the transaction is to be regarded as an absolute conveyance or a mortgage depends more upon its attendant circumstances than upon any express agreement making it defeasible; and it is doubtful whether parol proof of an agreement to reconvey, standing alone and without fraud, would be permitted to convert it into a mortgage. But facts and circumstances inconsistent with its being an absolute conveyance may be proved; and if they are clear and convincing enough to authorize a court of equity to infer that the conveyance was intended to secure a loan, under the jurisprudence of this state they should be submitted to a jury to find whether the transaction was a mortgage.³ The proof must establish an agreement for a reconveyance substantially contemporaneous with the execution and delivery of the deed, and not rest on the subsequent admissions and declarations of the mortgagee only. The agreement need not, however, be express; it may be inferred from circumstances.⁴

313. Rhode Island. — Parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.⁵

314. South Carolina. — Parol evidence is received to convert an instrument absolute on its face into a defeasible instrument, where the omission to reduce the defeasance to writing was occasioned by fraud or mistake.⁶ If it can be received in any other case the evidence must be very clear and convincing.⁷

315. Tennessee. — It is well settled that although a conveyance be absolute in its terms, it may be shown by parol proof to

¹ *Todd v. Campbell*, *supra*, per Strong, J.

² *Kerr v. Gilmore*, 6 Watts, 405, 414.

³ *Rhines v. Baird*, 41 Pa. St. 256; *McClurkan v. Thompson*, 69 Ib. 305; *Plumer v. Guthrie*, 76 Ib. 441; *Baisch v. Oaksley*, 68 Ib. 92.

⁴ *Plumer v. Guthrie*, *supra*.

"Less than this would not only conflict

with the rules of evidence which prescribe the manner in which a written instrument may be changed by parol, but also defeat the wise provision of the statute of frauds." Per *Mercur, J.*

⁵ *Taylor v. Luther* 2 Sumn. 298; *Nichols v. Reynolds*, 1 R. I. 30.

⁶ *Arnold v. Mattison*, 3 Rich. Eq. 153.

⁷ *Arnold v. Mattison*, *supra*.

be a mortgage. It seems to be admitted for the purpose of showing the intention of the parties and the real character of the transaction.¹ When a parol defeasance is shown, the effect of it is to reduce the title under an absolute deed to what was intended by the parties, a defeasible estate; a security for a debt, instead of a sale.² The evidence, however, must be clear and decisive, as the presumption is in favor of the deed as it appears upon its face.³

316. Texas. — The doctrine that parol evidence is admissible to prove that an absolute deed was intended merely as a security for the payment of a debt is fully recognized.⁴ It is admitted to show that the deed was really executed and delivered upon certain trusts, not reduced to writing, which the grantee promised to perform. These trusts existing in parol are established to prevent the fraudulent use of the deed or written instrument.⁵ It is not necessary that there should be any charge of fraud, mistake, or surprise, to afford a foundation for the introduction of such evidence.⁶ When it is attempted to use the deed for a fraudulent purpose, or one wholly different from that intended by the parties, equity interposes to prevent the fraud and establish the trust. The trust must be shown with clearness and certainty, and it has sometimes been said that it must be shown by the testimony of more than one witness, unless that testimony be supported by corroborating circumstances.⁷ As in Pennsylvania, there being no court of chancery, such evidence must be passed upon by a jury.⁸

317. In Vermont parol testimony is admissible to show that a deed absolute in terms was in fact made as security for money

¹ *Nichols v. Cabe*, 3 Head, 92; *Ruggles v. Williams*, 1 Ib. 141; *Hinson v. Partee*, 11 Humph. 587; *Ballard v. Jones*, 6 Ib. 455; *Brown v. Wright*, 4 Yerg. 57; *Lane v. Dickerson*, 10 Ib. 373; *Yarbrough v. Newell*, 10 Ib. 376; *Guinn v. Locke*, 1 Head, 110; *Jones v. Jones*, Ib. 105.

² *Ruggles v. Williams*, *supra*.

³ *Haynes v. Swann*, 6 Heisk. 560; *Nickson v. Toney*, 3 Head, 655; *Hickman v. Quinn*, 6 Yerg. 96; *Lane v. Dickerson*, 10 Yerg. 373; *Overton v. Bigelow*, 8 Ib. 513; *Hammonds v. Hopkins*, Ib. 525.

⁴ *Gibbs v. Penny*, 43 Tex. 560; *Ruffler v. Womack*, 30 Tex. 332, 343; *Stampers v. Johnson*, 3 Tex. 1; *Carter v. Carter*, 5

Tex. 93; *Hannay v. Thompson*, 14 Tex. 142; *Mead v. Randolph*, 8 Tex. 191; *Mann v. Falcon*, 25 Tex. 271; *Miller v. Thatcher*, 9 Tex. 482; *McClenny v. Floyd*, 10 Tex. 159; *Cuney v. Dupree*, 21 Tex. 211; *Grooms v. Rust*, 27 Tex. 231.

⁵ *Moreland v. Barnhart*, 44 Tex. 275; *Mead v. Randolph*, *supra*; *Grooms v. Rust*, *supra*.

⁶ *Mead v. Randolph*, *supra*; *Carter v. Carter*, *supra*.

⁷ *Moreland v. Barnhart*, 44 Tex. 275, 583, and cases cited.

⁸ *Carter v. Carter*, *supra*; *Moreland v. Barnhart*, *supra*; *Ruffler v. Womack*, 30 Tex. 332.

loaned, if the grantor has remained in possession, and the title has continued in the grantee.¹ If he has parted with the title, the grantor loses his right to redeem. The fact that the grantor remains in possession is always regarded as a strong circumstance tending to show that the deed is a mortgage.² The absence of any written evidence of a debt does not make the deed less effectual as a mortgage.³ The ground upon which parol evidence is admitted seems to be that when the instrument is in fact a mortgage, and there is an attempt to set it up as an absolute conveyance, there is a fraudulent application or use made of it which a court in chancery may interfere with to prevent.⁴

318. Virginia. — Parol evidence is admitted in equity to determine whether a deed shall be considered a mortgage or an absolute purchase. The court is governed by the intention of the parties. The question is whether the parties intended to treat of a purchase, or to secure the repayment of money. To determine this, the whole circumstances of the transaction will be examined.⁵

319. West Virginia. — The rule in relation to the admission of parol evidence, to show that a deed is a mortgage, is the same that prevails in Virginia.⁶

320. In Wisconsin the admissibility of parol proof, to show a deed absolute on its face to be a mortgage, is the settled law.⁷

¹ Crosby v. Leavitt, 50 Vt. 239.

² Hills v. Loomis, 43 Vt. 562; Rich v. Doane, 35 Vt. 125; Wright v. Bates, 13 Vt. 341; Baxter v. Willey, 9 Vt. 276; Campbell v. Worthington, 6 Vt. 448; Wing v. Cooper, 37 Vt. 169; Hyndman v. Hyndman, 19 Vt. 9; Bigelow v. Topliff, 25 Vt. 273; Mott v. Harrington, 12 Vt. 199. In Conner v. Chase, 15 Vt. 764, it was held that such evidence was inadmissible to show that a deed of warranty, followed by possession through several successive grantees, by similar deeds, was a mortgage.

³ Graham v. Stevens, 34 Vt. 166.

⁴ Wright v. Bates, 13 Vt. 341, 348.

⁵ Ross v. Norvell, 1 Wash. 14; Thompson v. Davenport, 1 Ib. 125; King v. Newman, 2 Munf. 40; Breckenridge v. Auld, 1 Rob. 145; Dabney v. Green, 4 Hen. & Munf. 101; Chapman v. Turner, 1 Call, 280; Robertson v. Campbell, 2 Ib. 421; Pennington v. Hanby, 4 Munf. 140;

Bird v. Wilkinson, 4 Leigh, 266; Snively v. Pickle, 29 Gratt. 27.

⁶ Klinck v. Price, 4 W. Va. 4, 9, citing the above cases in Virginia; Troll v. Carter, 15 W. Va. 567; Davis v. Demming, 12 W. Va. 246; Lawrence v. Du Bois, 16 W. Va. 443.

⁷ Wilcox v. Bates, 26 Wis. 465. "Notwithstanding what was said in the opinion in Rasdall v. Rasdall, 9 Wis. 379, as to the admissibility of parol evidence to prove an absolute deed a mortgage, upon principle, it has since been frequently held by this court that the admissibility of such evidence had been so long established by authority as to have become a rule of property, which ought not to be changed by the judicial department." Per Paine, J.; and see Plato v. Roe, 14 Wis. 453; Sweet v. Mitchell, 15 Wis. 641; Spencer v. Frendall, 15 Wis. 666; Butler v. Butler, 46 Wis. 430.

This is not only the rule in equity,¹ but at law as well. The evidence, however, must be clear and convincing, such as courts of equity require in such cases, and equal in force to that upon which a deed will be reformed. As to the grounds upon which the evidence is admitted, "it is the fraudulent use of the deed which equity interposes to detect and prevent, and, for this purpose, parol proof is admissible, not to vary the deed, but to maintain the equity which attaches to the transaction inherently, and which the deed or contract of the parties does not create, and cannot destroy. If an equity of redemption really attaches to the transaction itself, any attempt to defeat that equity by setting up the deed as absolute is fraudulent."²

321. A review of the cases, with reference to the grounds upon which parol evidence is admitted to prove that an absolute conveyance is a mortgage in equity, will show that in the earliest cases, both in England and America, it was admitted solely upon the ground of fraud, accident, or mistake, which are ordinary grounds of equity jurisdiction. In several states this is still declared by the courts to be the only ground upon which their interference, in such case, can be justified; or, at any rate, there have been no decisions which distinctly place such interference upon any other ground. Such seems to be the doctrine in Alabama, Connecticut, Florida, Indiana, Kentucky, Maryland, North Carolina, Rhode Island, and South Carolina.³

In a few states, as for instance Iowa, Missouri, Vermont, and Wisconsin, it is declared that it is fraud on the part of the grantee to insist that the conveyance is absolute, when, in fact, it was in its origin intended to be redeemable. In Maine, Ohio, and Texas, the intention of the parties to create a security only seems to be regarded as raising a trust in favor of the grantor which equity will enforce.

But the doctrine in this country, now more generally accepted,

¹ *Kent v. Agard*, 24 Wis. 378; *Kent v. Lasley*, 24 Wis. 654. "The doctrine that a deed absolute in its terms can be thus transformed into a mortgage, and the title of the holder defeated, is purely an equitable, and not a legal, doctrine. It had its origin in the Court of Chancery, in which court alone the remedy could formerly be administered. The rules and practice of that court were such as to afford many safeguards to the rights of the grantee,

and to obviate many evils which must otherwise have grown up out of the doctrine." Per Dixon, C. J.

² *Rogan v. Walker*, 1 Wis. 527.

³ See §§ 285, 300; also *Maxwell v. Mountacute*, Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 98, 99; *Joynes v. Stat-ham*, 3 Ib. 388; *Pym v. Blackburn*, 3 Ves. Jr. 34, 38; *Townshend v. Stangroom*, 6 Ves. 328.

is, that the admission of parol evidence is not confined to cases of distinct fraud on the part of the grantee in obtaining a deed without a defeasance, or mistake on the part of the grantor in giving such a deed. The doctrine declared by the Supreme Court of the United States in *Russell v. Southard*,¹ and *Peugh v. Davis*,² and by the Supreme Court of Massachusetts in recent cases,³ is, that the mere fact that an absolute deed was intended as security merely affords ground of jurisdiction to courts of equity to interfere and give relief; that a security in this form is so calculated to be an instrument of oppression and wrong as in itself to constitute a *quasi* fraud, which equity should relieve against; that the fraud, or fault, is inherent in the transaction itself, and does not arise out of the subsequent conduct of the grantee in attempting to retain the property. This doctrine is declared with more or less distinctness in the later decisions of the courts of Arkansas, California, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, Pennsylvania, Tennessee, Virginia, and West Virginia.

322. The statute of frauds was at first supposed to stand in the way of allowing a grant, absolute on its face, to be established by parol evidence as a mortgage. But the courts, after a struggle and much hesitation, established the doctrine, as otherwise it was found that the statute designed to prevent frauds and perjuries would become in this way an effectual instrument of fraud or injustice.⁴ Although the admission of such evidence is placed upon different grounds by different courts, there is substantial unanimity in holding that, when once the fact is established that the grant was intended as a mortgage, the conveyance will be so regarded. The statute of frauds does not interpose any insuperable obstacle to granting relief in such a case, because relief, if granted, is obtained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. The equities of the parties are adjusted according to the nature of the transaction and the facts and circumstances of the case, including

¹ § 385.

² 96 U. S. 332.

³ § 300.

⁴ *Cotterell v. Purchase*, Cas. temp. Talbot, 61, 63; *Lincoln v. Wright*, 4 De G.

& J. 16, 22; *Carr v. Carr*, 52 N. Y. 251; *Moore v. Wade*, 8 Kans. 380, 387; *Sewell v. Price*, 32 Ala. 97; *Klein v. McNamara*, 54 Miss. 90.

the real agreement. It does not violate the statute of frauds to admit parol evidence of the real agreement as an element in the proof of fraud or other vice in the transaction, which is relied upon to defeat the written instrument.¹ Lord Hardwicke said that such evidence has nothing to do with the statute of frauds.²

Neither does the rule which excludes parol testimony to contradict or vary a written instrument have any application to such a case. This rule has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity: it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice.³

323. The grantor is not estopped from showing the true character of the transaction by reason that he has sworn, on an application for discharge in bankruptcy, that he had no interest in the land. The original transaction being without fraud, the subsequent improper conduct of the mortgagor, even if he were guilty of perjury, would not affect his right. At any rate the mortgagee cannot make the misconduct of the mortgagor, about which he need not concern himself, a ground for the non-performance of his own contract.⁴ The statute of frauds cannot be set up as inconsistent with showing that an absolute deed was intended by the parties merely as a security for the payment of money.⁵ If the grantee deny the trust raised by a verbal defeasance, on proof of the trust, such denial is regarded in some courts as a fraud, and the grantee is held to be as firmly bound by his verbal agreement as he would be by a written one, "hedged about with all the formal solemnity known to the law."⁶

¹ *Campbell v. Dearborn*, 109 Mass. 130, per Wells, J.; and see *Glass v. Hulbert*, 102 Mass. 24; *Newton v. Fay*, 10 Allen (Mass.), 505.

² *Walker v. Walker*, 2 Atk. 98.

³ *Pengh v. Davis*, 96 U. S. 332, 336, per Field, J.

⁴ *Smith v. Cremer*, 71 Ill. 185.

⁵ *Russell v. Southard*, 12 How. 139; *Maffitt v. Rynd*, 69 Pa. St. 380, 387, and cases cited; *Houser v. Lamont*, 55 Ib. 311; *Payne v. Patterson*, 77 Ib. 134; *Lee v. Evans*, 8 Cal. 424; *Raynor v. Lyons*, 37 Cal. 452.

⁶ *O'Neill v. Capelle*, 62 Mo. 202.

An agreement, however, between the grantee and a third person that the land shall be conveyed to him upon the payment by him of the purchase money and interest, is within the statute of frauds; because such a conveyance and agreement do not constitute a mortgage.¹ To constitute a mortgage, such agreement must be made with the grantor and not with a stranger. A promise by a third person to purchase the property, and convey it to the grantor, is open to the same objection.²

One claiming the benefit of such an agreement must show that at that time he had an equitable interest in the property. A mortgagee having foreclosed his mortgage, which was in the form of a trust deed, and purchased the property at the foreclosure sale, the mortgagor claimed there was a verbal agreement with him that the premises should still be held as security for the payment of the mortgage debt, and that when the rents received had been sufficient for that purpose the premises should be reconveyed to the mortgagor; that afterwards the mortgagor procured another person to advance the money for the payment of the mortgage debt, and the former mortgagor thereupon conveyed the property to this other person by absolute deed; and that this purchaser made an agreement to the same effect with the former mortgagor. The evidence was not very satisfactory. Mr. Justice Hunt, delivering the opinion of the Supreme Court in this case, declared that unless the equity of redemption of the mortgagor was kept alive by the alleged agreement with his mortgagee, he had no interest which could sustain a parol agreement by the purchaser from the mortgagee to buy the property for the mortgagor's benefit and to convey to him when required. Such an agreement is one creating by parol a trust or interest in lands, which cannot be sustained under the statute of frauds. It is a naked promise by one to buy lands in his own name, pay for them with his own money, and hold them for the benefit of another. It cannot be enforced in equity, and is void.³

¹ *Payne v. Patterson*, 77 Pa. St. 134; *Wilson v. McDowell*, 78 Ill. 514; and see *Sweet v. Mitchell*, 15 Wis. 641.

² *Wilson v. McDowell*, 78 Ill. 514; *Stephenson v. Thompson*, 13 Ill. 186; *Perry v. McHenry*, Ib. 227.

³ *Howland v. Blake*, 97 U. S. 624; S. C. 11 Chicago L. N. 139; 7 Biss. 40. See, also, *Levy v. Brush*, 45 N. Y. 589; *Richardson v. Johnsen*, 41 Wis. 100; *Digby v. Jones*, 67 Mo. 104; S. C. 18 Am. L. Reg. (N. S.) 132; §§ 331, 332.

2. *What Facts are considered.*

324. The true character of the conveyance will be inquired into, and effect given to the intention of the parties as ascertained by their conduct and declarations at the time and subsequently.¹ Thus, a verbal agreement made at the time of the conveyance, that it shall operate as security for a loan of money, if clearly proved, is decisive of the character of the transaction.² And so is an agreement that the deed shall stand only as security for a debt, and that in case of a sale by the grantee the excess of the proceeds over the debt shall be paid to the grantor. Such an agreement and deed constitute a mortgage; and therefore the agreement is not void, as an attempt to create a trust by parol.³ But it is said in some cases, that parol evidence of such an agreement should be supported by other facts and circumstances which are incompatible with the idea of a purchase, and leave no fair doubt that a security only was intended.⁴

325. Evidence of the continuance of the debt, such as the payment of interest upon it, or the extension of the time of payment, is generally conclusive of the character of the original transaction as a mortgage.⁵ It shows either that the preëxisting debt was not surrendered or cancelled at the time of the conveyance; or in case there was no such debt, it shows that one was then created.⁶ If the mortgagee retains the evidence of a preëxisting indebtedness, and receives rent from the mortgagor, this will be regarded as a payment of interest, and an evidence of a mortgage.⁷ The taking of judgment for the consideration money is evidence that an absolute deed was intended to be a mortgage.⁸

¹ See § 258; *Russell v. Southard*, 12 How. 139; *Crane v. Bonnell*, 2 N. J. Eq. (1 Gr.) 264; *Freeman v. Wilson*, 51 Miss. 329; *Daubenspeck v. Platt*, 22 Cal. 330; *Lodge v. Turman*, 24 Cal. 385; *Montgomery v. Spect*, 55 Cal. 352; *Tibeau v. Tibeau*, 22 Mo. 77; *Purviance v. Holt*, 8 Ill. 394; *Reigard v. McNeil*, 38 Ill. 400; *Whitcomb v. Sutherland*, 18 Ill. 578; *Williams v. Bishop*, 15 Ill. 553; *Cole v. Bolard*, 22 Pa. St. 431; *Prewett v. Dobbs*, 21 Miss. (13 S. & M.) 481; *Eiland v. Radford*, 7 Ala. 724; *Carter v. Carter*, 5 Tex. 93; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Ingalls v. Atwood*, 53 Iowa, 283.

² *Anthony v. Anthony*, 23 Ark. 479; *Anding v. Davis*, 38 Miss. 574.

³ *Crane v. Buchanan*, 29 Ind. 570.

⁴ *Blackwell v. Overby*, 6 Ired. (N. C.) Eq. 38; *Kelly v. Bryan*, Ib. 283.

⁵ See § 265; *Ruffier v. Womack*, 30 Tex. 332; *Eaton v. Green*, 22 Pick. (Mass.) 526, 530; *Westlake v. Horton*, 85 Ill. 228; *Klein v. McNamara*, 54 Miss. 90; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Montgomery v. Spect*, 55 Cal. 352; *Lawrence v. Du Bois*, 16 W. Va. 443.

⁶ *Farmer v. Grose*, 42 Cal. 169.

⁷ *Ennor v. Thompson*, 46 Ill. 214.

⁸ *Hamet v. Dundas*, 4 Pa. St. 178.

"In all this class of cases," says Chief

Of course, where there is no written acknowledgment of a debt or express promise to pay, the party who attempts to impeach the deed is obliged to make out his proofs by other and less decisive means. The absence of such evidence of debt is far from being conclusive that the transaction was a sale.¹ Formal mortgages are sometimes made without any personal liability on the part of the mortgagor. Moreover, when it is considered that the occasion for any inquiry in such case, as to the nature of the transaction, arises from the adoption of forms and outward appearances supposed to differ from the fact, it is hardly reasonable that the absence of a written contract of debt should be regarded as of more significance than the absence of a formal defeasance.² But the burden of proof is upon the grantor in an action to redeem to show that the relation of debtor and creditor existed between the grantor and grantee after the delivery of the deed.³

A mortgage in the form of an absolute conveyance is quite frequently and properly taken when the amount of the debt to be secured is uncertain, and depends wholly or in part upon future advances.⁴

326. When the transaction is shown to have been based upon a preëxisting debt, the question to be settled is, whether the intention of the parties was to cancel that debt or to secure it. This is a question of fact, for the determination of which not only the negotiations had at the time of the conveyance, but also the subsequent acts of the parties in relation to it, are to be considered. The mere fact that there was a debt at the time is not

Justice Poland, in *Rich v. Doane*, 35 Vt. 125, 128, "one principle has universally been recognized, that in order to convert a conveyance absolute upon its face into a mortgage, or security merely, there must be a debt to be secured. Some of the cases go so far as to hold that there must be a debt in such form that it can be enforced by action against the debtor, while others have denied it. We have no occasion now to decide whether the debt must be such that it could be enforced by action against the debtor; the tendency of later cases seems to be against it. But all agree that there must be a debt or loan to be secured, that the relation of debtor and creditor must exist between the grantor and grantee, in order to lay the foundation for converting an absolute

deed in form into a mere security. In this case there was no note or bond, or other evidence of debt, executed by the defendants; and though this is by no means conclusive, still it is a circumstance favorable to the orator, as if the parties intended the conveyance merely as a security for a loan or debt, it would have been natural that the ordinary evidence of a debt should have been required and given."

¹ *Flagg v. Mann*, 14 Pick. (Mass.) 467, 478; *Brown v. Dewey*, 1 Sandf. (N. Y.) Ch. 56; *Russell v. Southard*, 12 How. 139; *Robinson v. Farrelly*, 16 Ala. 472; *Morris v. Budlong*, 78 N. Y. 543.

² Per Wells, J., in *Campbell v. Dearborn*, 109 Mass. 130, 144.

³ *Helms v. Chadbourne*, 45 Wis. 60.

⁴ *Abbott v. Gregory*, 39 Mich. 68.

conclusive that the conveyance was a mortgage for its security. It can hardly be said that it raises a presumption of a mortgage, though the courts have generally manifested a disposition to construe all conveyances coupled with a stipulation for a reconveyance at a future day as mortgages. But whatever presumption of this kind there may be, it is readily repelled by any facts showing that the debt was surrendered and cancelled at the time of the conveyance. The burden is then upon the grantor to show that the deed is not to have effect according to its terms.¹

Although the securities are not surrendered, if the debt is absolutely extinguished a simple right to repurchase does not make the conveyance a mortgage.² Whether the transaction is a mortgage or not is determined by the answer to the inquiry, whether it was the intention of the parties to secure the payment of the debt or to extinguish it.³ If the object of the parties was to satisfy the debt, the conveyance must necessarily vest the estate absolutely in the grantee, and it cannot of course take effect as a mortgage; ⁴ even if the conveyance contains a redemption clause.⁵ But the fact that the evidence of the indebtedness is retained after the conveyance is strong evidence that it was taken merely as security.⁶

327. The transaction may have been a sale, although the application of the grantor was in the first place for a loan. In such a case, the person applied to having refused to deal except as a purchaser, and a conveyance having been made to him without his giving any contract to reconvey, the court refused, after a long lapse of time, to convert the transaction into a mortgage, upon evidence of loose conversations to the effect that the grantee would reconvey upon repayment, although coupled with evidence of inadequacy of consideration.⁷

328. The continued possession of the grantor is also evidence tending to show that the conveyance was a mortgage.⁸

¹ See §§ 267, 269; *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138; *Ford v. Irwin*, 18 Cal. 117; 14 Ib. 428; *Baisch v. Oakeley*, 68 Pa. St. 92; *Snavely v. Pickle*, 29 Gratt. (Va.) 27; *Montgomery v. Spect*, 55 Cal. 352.

² *Baxter v. Willey*, 9 Vt. 276.

³ *Bigelow v. Topliff*, 25 Vt. 273; *Toler v. Pender*, 1 Dev. & B. (N. C.) Eq. 445; *Todd v. Campbell*, 32 Pa. St. 250; and see *Allegheny R. R. & Coal Co. v. Casey*, 79 Ib. 84.

⁴ *Slee v. Manhattan Co.* 1 Paige (N. Y.), 48; *Hoopes v. Bailey*, 28 Miss. 328; *Carter v. Williams*, 23 La. Ann. 281.

⁵ *West v. Hendrix*, 28 Ala. 226.

⁶ *Ennor v. Thompson*, 46 Ill. 214.

⁷ *De France v. De France*, 34 Pa. St. 385.

⁸ See § 274; *Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & J. 16; *Ruffler v. Womack*, 30 Tex. 332; *Campbell v. Dearborn*, 109

This fact alone is not very important, but adds weight to other considerations which tend to this conclusion.

329. Inadequacy of price is also a circumstance tending to show that the transaction is a mortgage rather than a sale, just as it is when there is a written agreement for a reconveyance;¹ but this fact alone authorizes a court to declare a deed absolute upon its face to be a mortgage.²

330. Delay in asserting an absolute deed to be a mortgage has not the same effect upon the rights of the parties that attends delay in seeking to enforce in equity the performance of an executory contract.³ Once a mortgage always a mortgage is the maxim of the law, and payment does not stand on the footing of performance in equity. The character of the deed being fixed by the evidence as conditional, the mortgagor has the same time to make payment that any other debtor has. The only effect that delay can have in such a case is in its bearing on the primary question of mortgage or no mortgage. The poverty of the mortgagor, and many other circumstances, may sufficiently explain this. No lapse of time short of that which is sufficient to bar the action will prevent the introduction of parol evidence to show a deed was "intended as a mortgage."⁴

But lapse of time, in connection with other evidence, is a circumstance to be considered.⁵ When the grantor had conveyed by a warranty deed, and possession followed the deed through several successive grantees, parol evidence that a mortgage was intended has been refused. Length of time short of the period that will bar redemption affords a strong presumption against such a claim.⁶ A lapse of fourteen years from the time of the transaction has been considered a material circumstance.⁷ And

Mass. 130, 145; *Steel v. Black*, 3 Jones (N. C.) Eq. 427; *Streator v. Jones*, 3 Hawks (N. C.), 423; *Sellers v. Stalcup*, 7 Ired. (N. C.) Eq. 13; *Kemp v. Earp*, Ib. 167; *Thompson v. Banks*, 2 Md. Ch. 430; *Crews v. Threadgill*, 35 Ala. 334; *Daubenspeck v. Platt*, 22 Cal. 330; *Strong v. Shea*, 83 Ill. 575; *Davis v. Demming*, 12 W. Va. 246; *Lawrence v. Du Bois*, 16 W. Va. 443.

¹ See § 275; *Davis v. Stonestreet*, 4 Ind. 101; *Wilson v. Patrick*, 34 Iowa, 362, and cases cited; *Trucks v. Lindsey*, 18 Iowa, 504; *West v. Hindsey*, 28 Ala. 226; *Crews v. Threadgill*, 35 Ala. 334;

Overton v. Bigelow, 3 Yerg. (Tenn.) 513; *Gibbs v. Penny*, 43 Tex. 560; *Matthews v. Porter*, 16 Fla. 466, 487; *Klein v. McNamara*, 54 Miss. 90; *Davis v. Demming*, 12 W. Va. 246; *Lawrence v. Du Bois*, 16 W. Va. 443.

² *Pierce v. Traver*, 13 Nev. 526.

³ *Odenbaugh v. Bradford*, 67 Pa. St. 96.

⁴ *Anding v. Davis*, 38 Miss. 574.

⁵ *Tull v. Owen*, 4 Y. & C. 192.

⁶ *Conner v. Chase*, 15 Vt. 764.

⁷ *De France v. De France*, 34 Pa. St. 385; *Maher v. Farwell*, 97 Ill. 56.

where the bill to redeem was not filed until thirteen years after the conveyance, and it also appeared that more than seven years had elapsed since the grantee distinctly refused to recognize the grantor's claim of an equity of redemption, and there was no sufficient excuse for the delay, the laches was held to be such as to bar any right to relief.¹

331. In equity it is regarded as unnecessary that the conveyance should be made by the debtor. It is sufficient that he has an interest in the property, either legal or equitable. Having such an interest, if he procure a conveyance of the property to one who pays the price of it, or makes an advance upon it, under an arrangement that he shall be allowed to have the property upon repaying the money advanced, he has a right to redeem. The grantee in such case acquires title by his act, and as security for his debt, and therefore holds the title as his mortgagee.² Thus, if a person advances for another at his request the purchase money of land which the latter contracts to buy, and the deed be made to the person who advances the money, he is as much a mortgagee as if the land had been conveyed to him directly by the debtor.³ If part only of the purchase money be advanced by such grantee, he has a lien upon the whole land, and not merely upon an undivided interest in proportion to the amount of his advance.⁴

But at law when a trustee, at the request of the husband of the *cestui que trust*, and acting as her agent in fact, sold certain trust land to one who agreed to convey the land to the husband on his repaying the purchase money, it was declared that the transaction did not constitute a mortgage, and could not be dealt with as such.⁵ In like manner, where one at the request of a debtor, whose land had been sold on execution, purchased the land, agreeing by parol with the debtor that, upon his paying the purchase money and interest, he would convey it to him, or if the land should be sold for more than this to pay the surplus to the debtor, it was held that this transaction did not constitute a

¹ Maher v. Farwell, 97 Ill. 56.

² See §§ 241, 268, 323; Stoddard v. Whiting, 46 N. Y. 627; Carr v. Carr, 52 N. Y. 251; McBurney v. Wellman, 42 Barb. (N. Y.) 390; Wright v. Shumway, 1 Biss. 23; Houser v. Lamont, 55 Pa. St. 311; Stinchfield v. Milliken, 71 Me. 567, 570; Fisk v. Stewart, 24 Minn. 97; Lindsay v. Matthews, 17 Fla. 575.

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³ Hidden v. Jordan, 21 Cal. 92; Smith v. Knoebel, 82 Ill. 392; Strong v. Shea, 83 Ill. 575; Barnett v. Nelson, 46 Iowa, 495; Hardin v. Eames, 5 Bradw. (Ill.) 153; Brumfield v. Boutall, 24 Hun (N. Y.), 451.

⁴ Hidden v. Jordan, *supra*.

⁵ Penn. Life Ins. Co. v. Austin, 42 Pa. St. 257. See § 323.

mortgage, because the debtor had no interest in the land at the time of this agreement, and of the purchase made in consequence of it. The purchase was not conditional between such purchaser and his grantor, who alone was interested in the property at that time. There was no agreement that the land was, under any circumstances, to revert to his grantor. But if one holding a bond or agreement for a deed, after paying a portion of the purchase money, procure a third person to pay the balance, and the land is conveyed to him as security, he agreeing to reconvey within a certain time on payment of his advances, the transaction is a mortgage.¹ Such holder of the agreement for purchase has an interest in the land by reason of the payment made by him.

If the person who procures another to purchase land upon a verbal understanding that the purchaser will convey the premises to him upon being reimbursed the amount paid with interest, had no interest in the premises either legal or equitable, the transaction will be regarded as a mere contract of sale, and not a mortgage.²

332. Sometimes regarded as a trust. — One who purchases at a foreclosure sale for the benefit of the mortgagor, and thus acquires the title at a price below the value of the property, may be deemed a trustee of the party for whom he has undertaken the purchase.³ Such an agreement, although verbal merely, is not within the statute of frauds. The trust in such case arises or results upon the conveyance. It is a fraud to refuse to execute the agreement, and a court of equity will not permit the grantee to use the statute of frauds as an instrument of fraud. It would seem, however, that there can be no resulting trust unless the person claiming it has some interest in the property. "If A. purchases an estate with his own money," says Chancellor Kent, "and takes the deed in the name of B., a trust results to A. *because he paid the money*. The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds."⁴ This distinction is illustrated

¹ McClintock v. McClintock, 3 Brewst. (Pa.) 76.

² Caprez v. Trover, 96 Ill. 456.

³ § 323; Ryan v. Dox, 34 N. Y. 307; 92.

Brown v. Lynch, 1 Paige (N. Y.), 147;

Sandfoss v. Jones, 35 Cal. 481, 486; Reece v. Roush, 2 Mont. 586, and cases cited; and see McDonough v. O'Niel, 113 Mass.

⁴ Botsford v. Burr, 2 Johns. (N. Y.)

by a case which was twice before the Supreme Court of Illinois. Land having been advertised for sale under a senior mortgage, the owner and the junior mortgagee arranged with a third person to bid the land off for the amount of both mortgages, and the junior mortgagee furnished the money to pay the amount due on the first mortgage, with the understanding that the owner might have further time in which to sell the land and pay off the amount due on both mortgages, with interest upon them. The transaction was held to amount to a mortgage, and to entitle the owner to a conveyance upon payment according to the understanding.¹ But when the case was first before the court, it did not appear that the owner had paid any portion of the purchase money at the sale, and therefore the bill to enforce the trust was dismissed.² In like manner, it may be shown that one purchasing at a sheriff's sale really purchased for the benefit of the debtor, and upon agreement to convey to him upon a subsequent repayment of the amount paid.³ The trust may be supported, it would seem, even when the person who claims the benefit of the purchase has not actually paid any money towards the purchase, if under an arrangement with the purchaser he has abstained from bidding himself, so that the purchaser has obtained the property at a price much below its real value. The person for whom the property was bought under such an arrangement is considered as having an interest in it.⁴

A transaction whereby one who is embarrassed conveys land to another, on his promise to obtain a loan for him to pay his debts from a building association, and apply the rents to the repayment of the loan, and to reconvey the land when the building

Ch. 405; followed in *Magnusson v. Johnson*, 73 Ill. 156; *Perry v. McHenry*, 13 Ill. 227, and cases cited; *Stephenson v. Thompson*, *Ib.* 168; *Holmes v. Holmes*, 44 Ill. 186; *Ranstead v. Otis*, 52 Ill. 30; *Robertson v. Robertson*, 9 Watts (Pa.), 32; *Haines v. O'Conner*, 10 *Ib.* 313.

¹ *Klock v. Walter*, 70 Ill. 416. See Illinois cases cited on rule that absolute conveyance as a security is a mortgage.

² *Walter v. Klock*, 55 Ill. 362.

In *Merritt v. Brown*, 19 N. J. Eq. 286, where the purchaser at a foreclosure sale agreed to allow the mortgagor to repurchase within a given time, it was held that he was not entitled to relief after that

time. He had paid nothing, and no trust resulted in his favor.

³ *Hiester v. Maderia*, 3 Watts & S. (Pa.) 384; *Guinn v. Locke*, 1 Head (Tenn.), 110; *Barkewlew v. Taylor*, 8 N. J. Eq. (4 Halst.) 206. See *Price v. Evans*, 26 Mo. 30, where an agreement to reconvey in such case was regarded as a temporary privilege and not a mortgage, in view of the circumstances of the case; *Sahler v. Signer*, 37 Barb. (N. Y.) 329; *Smith v. Doyle*, 46 Ill. 451; *Roberts v. McMahan*, 4 Greene (Iowa), 34.

⁴ *Barkewlew v. Taylor*, *supra*; *Marlatt v. Warwick*, 18 N. J. Eq. 108.

association shall expire, is a mortgage and not a trust.¹ Whenever there is in fact an advance of money to be returned within a specified time, upon the security of an absolute conveyance, the law converts the transaction into a mortgage, whatever may be the understanding of the parties.² Even a sheriff's sale will be converted into a mortgage when it is made the means to carry out the agreement of the parties to raise money by way of loan, and the loan is made in consequence of it.³

333. Absolute assignment of a mortgage as collateral. — The same rules that determine the admissibility of parol evidence to establish an absolute deed as a mortgage are equally applicable to show that an assignment of a mortgage, absolute in form, is in fact not a sale, but only collateral security for a loan.⁴ The chief inquiry always is, whether a debt was created by the transaction and continued afterwards. The character of security once having attached to the mortgage, this character continues through whatever changes it may undergo in the hands of the assignee; and attaches to money collected upon the mortgage, and to a title that has become absolute by foreclosure.⁵

334. An assignment of a contract of purchase as security is a mortgage, and when the assignee has completed the payments and taken a conveyance to himself, the relation of the parties remains the same. Under the principle, once a mortgage always a mortgage, the transaction retains that character until it is either foreclosed or redeemed.⁶

335. Strict proof required. — One who alleges that his deed in absolute form was intended as a mortgage only is required to make strict proof of the fact. Having deliberately given the transaction the form of a bargain and sale, slight and indefinite evidence should not be permitted to change its character.⁷ The proof must be clear, satisfactory, and convincing.⁸ The fact that

¹ Danzeisen's Appeal, 73 Pa. St. 65; and see *Church v. Cole*, 36 Ind. 34.

² Harper's Appeal, 64 Pa. St. 315, 320; and see *Steinruck's Appeal*, 70 Pa. St. 289.

³ Sweetzer's Appeal, 71 Pa. St. 264.

⁴ *Pond v. Eddy*, 113 Mass. 149; *Briggs v. Rice*, 130 Mass. 50.

⁵ *Pond v. Eddy*, 113 Mass. 149.

⁶ *Smith v. Cremer*, 71 Ill. 185.

⁷ *Magnusson v. Johnson*, 73 Ill. 156; *Smith v. Cremer*, 71 Ill. 185; *Price v.*

Karnes, 59 Ill. 276; *Taintor v. Keys*, 43 Ill. 332; *Dwen v. Blake*, 44 Ill. 135; *Par-melee v. Lawrence*, Ib. 405; *Sharp v. Smitherman*, 85 Ill. 153; *Knowles v. Knowles*, 86 Ill. 1.

⁸ *Howland v. Blake*, 97 U. S. 624; *S. C.* 11 Chicago L. N. 139; 7 Biss. 40; *Hancock v. Harper*, 86 Ill. 445; *Jones v. Brittan*, 1 Woods, 667; *Bingham v. Thompson*, 4 Nev. 224; *Conwell v. Evill*, 4 Blackf. (Ind.) 67; *Williams v. Stratton*, 18 Miss. (10 Sm. & M.) 418; *Moore v.*

the grantor understood the transaction to be a mortgage is not alone sufficient to prove it to be so.¹ One who has assigned a contract for the purchase of real estate and permitted the assignee to take an absolute deed from the owner cannot be allowed to redeem upon an allegation, without proof, that the transaction was in fact a mortgage, and that he assented to it upon the confidence that it would be so treated by his creditor.² Testimony of admissions by the grantee, made subsequently to the conveyance, that the conveyance was intended as a mortgage may, with corroborating circumstances, be sufficient to establish the fact,³ but alone is not sufficient.⁴

When, however, it is once admitted that the deed was made merely to secure a debt, and the question is, what is the amount of the debt, the burden is upon the grantee to show it.⁵

Ivey, 8 Ired. (N. C.) Eq. 192; *Arnold v. Mattison*, 3 Rich. (S. C.) Eq. 153; *Williams v. Cheatham*, 19 Ark. 278; *Mathews v. Porter*, 16 Fla. 466; *Butler v. Butler*, 46 Wis. 430; *Pierce v. Traver*, 13 Nev. 526; *Johnson v. Van Velsor*, 43 Mich. 208; *Maher v. Farwell*, 97 Ill. 56.

¹ *Holmes v. Fresh*, 9 Mo. 201; *Phoenix v. Gardner*, 13 Minn. 430; *Jones v. Brittan*, 1 Woods, 667.

² *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138.

³ *Bentley v. Phelps*, 2 Woodb. & M. 426; *McIntyre v. Humphreys*, 1 Hoffm. (N. Y.) 31.

⁴ *Todd v. Campbell*, 32 Pa. St. 250.

⁵ *Freytag v. Hoeland*, 23 N. J. Eq. 36. It was admitted that the deed, though absolute on its face, was given as security only, and therefore a mortgage. The plaintiff, who sought to recover the property, claimed that it was security for \$700 only; the defendant claimed that it was security not only for that sum but for previous advances of about \$5,300. The plaintiff denied that these advances were made to him or on his credit; and said that the advances were made to his wife and daughter for a different consideration.

The circumstances of the case, in the language of the Chancellor, are "novel and peculiar." Hoeland was a butcher, and followed his trade at Newark; and afterwards in California and Nevada. He also speculated in mining rights in the

latter states. He prospered and had money.

Freytag was a carpenter; he worked at his trade in Newark, where Hoeland boarded for a time in his family. At this time either Mrs. Freytag proposed to Hoeland, or Hoeland proposed to Mrs. Freytag, to elope together. Each said the offer came from the other, and it was virtuously rejected by the party testifying. The result was that Hoeland changed his boarding place, and Mr. Freytag, in an encounter with him, got a wound over his eye, the scar of which he still bore. But notwithstanding these inharmonious circumstances Hoeland was again received as a boarder by Mrs. Freytag, with whom he was on very friendly and confidential terms.

Katinka, the daughter of the Freytags, was growing up towards womanhood and Hoeland took a fancy to her, and proposed to make her his wife when the proper time should arrive. In this he had the support of the mother. Katinka submitted passively, though it did not appear that she ever engaged herself to him. Freytag was an easy-going, submissive man, who did not get on in the world. Katinka had some talent for music, and took lessons to fit her for taking part in concerts and the opera. Hoeland, at the solicitation of the mother and daughter, furnished them with money. In 1868, the Freytags went to Europe; Freytag

336. The grantor on redeeming or seeking a reconveyance must comply with his agreement, and pay the amount due.¹ On the principle that "he who seeks equity must do equity," a grantor who seeks to redeem land from a conveyance made to secure the performance of a verbal agreement to pay a certain sum of money in gold coin should be held to a full compliance with the terms of his agreement, as a condition precedent to a reconveyance.² On this ground it has been held, that although a loan upon land has been put in the form of an absolute deed and an agreement to reconvey, for the purpose of covering up a contract for usurious interest, the mortgagor is not entitled to the statutory penalties or forfeitures for usury, but must pay on redeeming the amount of the original loan, with legal interest.³

Equity will not relieve a grantor on his own application from the consequences of an absolute deed, made to protect his property from his creditors.⁴

337. A judgment creditor may show the character of his debtor's conveyance. Having purchased his debtor's land at a sale under execution issued upon his judgment, he may show that an absolute conveyance of the land made by his debtor was in fact a mortgage, and he is entitled to a conveyance of it upon

returned, but the mother and daughter went to Milan and remained for Katinka's musical education. There Hoeland sent money to them, at the earnest request of the daughter, who in one of her letters almost promised to come back to him at San Francisco. The correspondence and all the arrangements were conducted without consulting Freytag.

"It would not be strange," said the Chancellor, "if a young woman of promise, however humble her origin, who had taken lessons of masters of music, especially in Italy, where the art has reached its highest cultivation, should show some reluctance to fulfil an engagement made for her in childhood, and marry a practical butcher far older than herself, and live with him in Nevada or California. Some indications of this feeling, or perhaps a conclusion that mother and daughter had been using his attachment and hopes to obtain his money without any regard to fulfilling his expectation, seems to have aroused Hoeland to

his situation, and to have changed his course regarding them."

In the summer of 1869, Hoeland was in Jersey City; Freytag saw him, and being pressed for money, applied to him for a loan, which was at first refused. Afterwards he consented to advance \$700, on receiving an absolute conveyance of a house and lot subject to a mortgage of \$8,000, but worth twice that sum; and such was the arrangement made. Hoeland claimed that the conveyance secured the advances to the mother and daughter, who were still in Europe. The Chancellor held that the burden was upon the grantee, to show that more than the \$700 was secured; and that there was no proof that any further sum was secured.

¹ *White v. Lucas*, 46 Iowa, 319; *Westfall v. Westfall*, 16 Hun (N. Y.), 541.

² *Cowing v. Rogers*, 34 Cal. 648.

³ *Heacock v. Swartwout*, 28 Ill. 291.

⁴ See § 283; *Arnold v. Mattison*, 3 Rich. (S. C.) Eq. 153; *Hassam v. Barrett*, 115 Mass. 256.

paying any balance due upon the mortgage.¹ And without having made a purchase upon execution, a creditor of the grantor may show that such absolute deed is really a mortgage, and may enforce a judgment against the property or the proceeds of it to the extent of the surplus, after satisfying the debt for the security of which it was conveyed.² A judgment obtained against the grantor by a creditor, after the making of an absolute deed, which is really a mortgage, becomes a lien upon the equity of redemption, just as it would if a formal mortgage had been given.³

338. Election to treat the conveyance as absolute.—A mortgagor who abandons his right to redeem from an absolute conveyance, and elects to treat the conveyance as an absolute deed instead of a mortgage, is bound by such election, and cannot afterwards redeem.⁴ He may also verbally waive his right of redemption in favor of another person, and after a long acquiescence in the transaction, the other in the mean time having redeemed the land and improved it, he will not be allowed to redeem from him.⁵ When the grantee goes into possession and makes valuable improvements, and, with the knowledge of the grantor, sells the property, the latter is estopped to claim that his deed was a mortgage.⁶ In any event redemption must be made within the time allowed by the statute of limitations.⁷

339. As to third persons the grantee is absolute owner.—The grantee of the legal title, whether the transaction be a mortgage or a conditional sale, may exercise all the rights of an absolute owner as to third parties.⁸ The grantor, in order to maintain an action for rent, cannot show that his deed was intended

¹ *Judge v. Reese*, 24 N. J. Eq. 387; *Clark v. Condit*, 18 Ib. 358; *Vandegrift v. Herbert*, Ib. 466; *Van Buren v. Olmstead*, 5 Paige (N. Y.), 9.

² *Allen v. Kemp*, 29 Iowa, 452; *De Wolf v. Strader*, 26 Ill. 225; *Dwen v. Blake*, 44 Ill. 135.

³ *Christie v. Hale*, 46 Ill. 117.

⁴ *Maxfield v. Patchen*, 29 Ill. 39, 42.

⁵ *Carpenter v. Carpenter*, 70 Ill. 457. The plaintiff in this case having been unsuccessful in a love matter with a girl in the neighborhood, started for California, and, when he reached Chicago, on the road, he wrote to his father to redeem the land and it should be his; that he would never return from California until he was

able to set his heel upon the neck of the Gnil tribe (relatives of the girl). The father redeemed the land, sold it, and invested the proceeds in other land. It was held that the father was not liable to account, especially after a lapse of eighteen years unexplained.

⁶ *Woodworth v. Carman*, 43 Iowa, 504.

⁷ *Westfall v. Westfall*, 16 Hun (N. Y.), 541.

⁸ See *Fiedler v. Darrin*, 59 Barb. 651; *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126; S. C. 19 Alb. L. J. 340; *McCarthy v. McCarthy*, 36 Conn. 177; *Digby v. Jones*, 67 Mo. 104; S. C. 18 Am. L. Reg. N. S. 132; *Pico v. Gallardo*, 52 Cal. 206.

as a mortgage, and that he is entitled to the position and rights of a mortgagor in possession.¹

A purchaser who has knowledge that his grantor, though holding the estate by an absolute conveyance, nevertheless is, in fact, only a mortgagee, acquires a defeasible estate only, and it is defeasible upon the same terms as it was in the hands of the original grantee.² And so a purchaser who has paid no valuable consideration for his conveyance occupies a position no better than his grantor.³ A mortgage was made of certain mills to secure the sum of \$4,000; and the mortgagor also conveyed to the mortgagee other land absolutely, as security for a further sum of \$6,000. The mortgagee assigned the mortgage and conveyed the land to a third person, who had notice of the character of the prior conveyance. This assignee foreclosed the mortgage upon the mills, and purchased them upon the sale. He then mortgaged the mills and the other lands to the former mortgagee; and it was held that this mortgage was a lien upon the other lands only to the extent of the original loan upon them of \$6,000, upon the payment of which sum the original owner was entitled to redeem.⁴

340. Once a mortgage always a mortgage.— If originally taken as a mortgage, nothing but a subsequent agreement of the parties can change its character, and deprive the mortgagor of his right of redemption; and even such an agreement cannot change its character as to intervening interests.⁵ This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage.⁶ The maxim, "Once a mortgage always a mortgage," applies to such a deed; and if a purchaser take a conveyance from the grantee, with a knowledge that the grantor claims an interest in the property, he takes it charged with the same equities with which it was charged

¹ *Abbott v. Hanson*, 24 N. J. L. (4 Zab.) 493.

² *Houser v. Lamont*, 55 Pa. St. 311, and cases cited; *Kuhn v. Rumpp*, 46 Cal. 299; *Graham v. Graham*, 55 Ind. 23; *Amory v. Lawrence*, 3 Cliff. 523; *Smith v. Knoebel*, 82 Ill. 392; *Lawrence v. Du Bois*, 16 W. Va. 443.

³ *Lawrence v. Du Bois*, *supra*.

⁴ *Williams v. Thorn*, 11 Paige (N. Y.), 459.

⁵ *Elliott v. Wood*, 53 Barb. (N. Y.)

285; *Tibbs v. Morris*, 44 Ib. 138; *Bunacleugh v. Poolman*, 3 Daly (N. Y.), 236; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *S. C. Henry v. Davis*, 7 Johns. Ch. 40; *Palmer v. Gurnsey*, 7 Wend. (N. Y.) 248; *Cooper v. Whitney*, 3 Hill (N. Y.), 95; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594; *Williams v. Thorn*, 11 Paige (N. Y.), 459; *Parsons v. Mumford*, 3 Barb. (N. Y.) Ch. 152.

⁶ *Pengh v. Davis*, 96 U. S. 332, per Field, J.

in the hands of the mortgagee.¹ The mortgagor may make a subsequent release of the equity of redemption; but an adequate consideration is necessary to support it. It must be for a consideration that would be deemed reasonable if the transaction were between other parties. Such a release will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will estop him afterwards to assert any interest.² In determining whether an instrument of uncertain import in itself was intended to operate as a release, the fact that the value of the property was at the time greatly in excess of the amount then paid, and of that originally secured, and the fact that the mortgagor retained possession of the land and cultivated it, are strong evidence tending to show that a release was not intended.³

341. Grantee's liability for mortgaged land sold by him. — Although a grantee in an absolute deed, intended as a mortgage, has the power to convey it by a good indefeasible title to a purchaser without notice, yet he is liable to the mortgagor for the value of the land so conveyed; and he cannot defend an action to recover such value by showing that the mortgagor's title was invalid, and that the legal title has since been bought in by the purchaser. The imperfection of the title did not justify his placing it beyond the reach of the mortgagor. It is the duty of the mortgagee upon receiving payment to restore the land, without regard to the condition of the title, in no worse condition, so far as his own acts could affect it, than it was when he received it. But in estimating the value of the land sold, the sum paid for an outstanding title, although paid by the purchaser and not by the mortgagee, may be deducted from the value of the land.⁴ The grantee in an absolute deed by way of mortgage, who has sold the land, is liable for the proceeds of the sale, deducting the amount due him and a reasonable compensation for effecting the sale.⁵ He is not allowed to show that the price received in consequence of liberal terms of payment, or for any other reason, is in excess of the market value of the lands.⁶

¹ *French v. Burns*, 35 Conn. 359.

² *Peugh v. Davis*, 96 U. S. 332.

³ *Peugh v. Davis*, *supra*.

⁴ *Adkins v. Lewis*, 5 Oregon, 292.

⁵ *Van Dusen v. Worrell*, 4 Abb. (N. Y.) App. Dec. 473. In an action for

money had and received: *Jackson v. Stevens*, 108 Mass. 94; *Hiester v. Maderia*, 3 Watts & S. (Pa.) 384; *Barkleew v. Taylor*, 8 N. J. Eq. (4 Halst.) 206.

⁶ *Budd v. Van Orden*, 33 N. J. Eq. 143.

When the grantee has wrongfully conveyed the property, the grantor may at his election claim the proceeds of the sale;¹ or the value of the land at the time when the debtor's right to have it restored to him is established.²

The statute of limitations applicable to actions of assumpsit applies to an action for an excess of proceeds of a sale of such land above the mortgage debt. A suit to recover the land or to redeem would not be barred by a lapse of time shorter than that which would bar an action of ejectment at law. But a claim to the proceeds of a sale is not a claim to real property but only for the recovery of money. The statute of limitations applies to proceedings in equity only by analogy; and the analogous case at law is an action of assumpsit, or an action of account, and not an action of ejectment.³

342. A bill in equity may be maintained to redeem, as from a mortgage, land which the defendant holds by deed from the plaintiff upon evidence that the deed, though absolute in form, was really taken as security for a loan. The decree is for a reconveyance of the land upon the payment of the amount which may be found due the grantee, or upon compliance with such terms as the court may impose.⁴

¹ *Meehan v. Forrester*, 52 N. Y. 277.

² *Enos v. Sutherland*, 11 Mich. 538.

³ *Hancock v. Harper*, 86 Ill. 445; *Amory v. Lawrence*, 3 Cliff. 523. See, however, *Hunter v. Hunter*, 50 Mo. 445, 450.

⁴ *Campbell v. Dearborn*, 109 Mass. 130;

McDonough v. Squire, 111 Mass. 217;

Westlake v. Horton, 85 Ill. 228.

CHAPTER IX.

THE DEBT SECURED.

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|---------------------------------------|--------------------------------------|
| I. Description of the debt, 343-363.* | III. Mortgage of indemnity, 379-387. |
| II. Future advances, 364-378. | IV. Mortgages for support, 388-395. |

1. *Description of the Debt.*

343. A general description of the debt sufficient.¹ It is not essential that the mortgage itself should contain a description of the debt intended to be secured. The nature and amount of the indebtedness secured may be expressed in terms so general that subsequent purchasers and attaching creditors must look beyond the deed, to ascertain both the existence and amount of the debt. It is even held that a deed absolute in form, if in fact intended by the parties as a security for subsequent advances or liabilities to be assumed by the grantee in the grantor's behalf,² is a valid security against judgment or execution creditors, or other incumbrancers, although such intention does not appear upon the deed, or by any evidence in writing.

All the description required to be made of the debt is a general one, which will put those interested upon inquiry.³ A condition to pay the mortgagee "what I may owe him on book" may be held to cover not only the present but the future indebtedness of the mortgagor, at least until the mortgagee should receive express notice of subsequent incumbrances or interests, and he is not bound to watch the registry for subsequent conveyances. And so a mortgage to secure the payment of \$1,500, which the mortgagor owed on book account, and by several notes, without specifying the amount or date of any particular note, sufficiently describes the debt.⁴ A mortgage to secure a claim on book account, for goods sold and delivered, in about the sum of \$5,000, is sufficient

¹ See § 70.

² *Gibson v. Seymour*, 4 Vt. 518, approved in *Seymour v. Darrow*, 31 Vt. 122.

³ *McDaniels v. Colvin*, 16 Vt. 300; *Hurd v. Robinson*, 11 Ohio St. 232.

⁴ *Merrills v. Swift*, 18 Conn. 257. See, also, *Shirras v. Caig*, 7 Cranch, 34; *Truscott v. King*, 6 Barb. (N. Y.) 346; *Stuyvesant v. Hall*, 2 Barb. (N. Y.) Ch. 151.

to secure the mortgagee's actual claim not exceeding that sum.¹ And when the mortgagor made a mortgage conditioned to pay the mortgagee "all the notes and agreements I now owe or have with him," the mortgagee was permitted to hold the security for payments made as an indorser for the mortgagor under an existing agreement.² A condition to pay "all sums that the mortgagee may become liable to pay by signing or otherwise" is not too indefinite, and includes any legal liability he may incur for the mortgagor.³

344. The amount of an ascertained debt should be stated.

When the mortgage is given to secure future advances, it is of course not practicable to state in the mortgage itself anything more than a limit to which such advances may reach; and such a limit is required by some courts, though it is generally held to be sufficient that the mortgage sets forth the foundation of such liability, or such data, as will put any one interested upon the track to find out the extent of the liability. Moreover, when the mortgage is given to secure a debt, the amount of which is not ascertained, it is sufficient if the mortgage contains such facts about it as will lead an interested party to ascertain the real state of the incumbrance. But if the mortgage is giving to secure an ascertained debt, the amount of that debt ought to be stated; and accordingly it has been held that a mortgage given to secure an existing debt, of a fixed amount, but which is described in the condition of the mortgage only as a note due from the mortgagor to the mortgagee, of a certain date, payable on demand with interest, without specifying the amount, is not a valid security against subsequent incumbrances.⁴ This is required not by any

¹ *Lewis v. De Forest*, 20 Conn. 427.

² *Seymour v. Darrow*, 31 Vt. 122.

³ *Soule v. Albee*, 31 Vt. 142.

⁴ *Hart v. Chalker*, 14 Conn. 77. Chief Justice Williams, delivering the opinion of the court, said: "Whether this omission was owing to design or accident, we are not informed. In either case the effect would be the same; and the public would not have that information which it was intended should be given, and which, if generally neglected, would make our records of little value. Indeed, if such a general description is good, it would seem as if it were enough to say, 'This mortgage is intended to secure any debt due;' for there would be little more danger, in

that case, of substituting fictitious debts, than in this where the sum is omitted; for he who would substitute fictitious debts, under that general description, would have very little additional restraint from the fact that the date and time were given. It is said that there is enough to put a person on inquiry, and that is all a court of equity requires. That principle, however, we do not think is applicable to cases of this class, where there is a certain known debt. If it is to be adopted as a general rule, it would overturn all the cases in which this court have held that the description was too indefinite." The cases cited by the Chief Justice in this connection are: *Pettibone v. Griawold*, 4 Conn.

specific provision of the registry law; but the spirit of the system requires that the record should disclose, with as much certainty as the nature of the case will admit of, the real state of the incumbrance.

A mortgage describing as an absolute indebtedness a note given as security for a contingent liability assumed by the mortgagee, such as that of an indorser, is not good against a *bonâ fide* purchaser of the land without notice.¹

The cases in Connecticut, which require this degree of strictness in describing the indebtedness, are not supported by the weight of authority.² It is generally held to be sufficient if it appear that a debt is secured, and that the amount of it may be ascertained by reference to other instruments, or by inquiry otherwise.

158, 162; *Crane v. Deming*, 7 Ib. 388, 395; *Booth v. Barnum*, 9 Ib. 286, 290; *Bolles v. Chauncey*, 8 Ib. 390. See, also, *St. John v. Camp*, 17 Ib. 222, 230; *Metropolitan Bank v. Godfrey*, 23 Ill. 579, 604.

A similar decision was made in a recent case in Kentucky. *Pearce v. Hall*, 12 Bush, 209. The condition was for the payment of a note fully described, with the exception that the amount was not set out, nor was there anything in the conveyance from which any inference whatever as to the amount could be drawn. It was held, that a subsequent attaching creditor had precedence. Mr. Justice Lindsay said: "We are satisfied that a mortgage, to be good against a purchaser for a valuable consideration, or a creditor, must not only be lodged for record in the proper office, but must, as far as is reasonably practicable, set out the amount of the debt for the payment of which the parties intend it as a security. We do not mean to intimate that an omission to state the date of the note, or the time at which it will fall due, or the precise amount of the debt, even when the amount is ascertained, is essential to make the mortgage valid; but to hold the omission in this case immaterial would be in effect to say that a mortgage need only show that the mortgagor is indebted to the mortgagee, and that purchasers and creditors must, upon that recital, ascertain for themselves, as best they can, the amount of the indebtedness."

In Maryland no mortgage is valid except as between the parties thereto, unless

there be indorsed thereon an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bonâ fide* as therein set forth; this affidavit may be made at any time before the mortgage is recorded, before any one authorized to take the acknowledgment of a mortgage, and the affidavit shall be recorded with the mortgage. The affidavit may be made by one of several mortgagees, and shall have the same effect as if made by all; or the affidavit may be made by any agent of a mortgagee, and when made by an agent he shall, in addition to the affidavit above mentioned, make affidavit to be indorsed upon the mortgage that he is agent of the mortgagee or mortgagees, or some one of them, which affidavit shall be sufficient proof of such agency; and the president or other officer of a corporation, or the executor of the mortgage, may make such affidavit. R. S. Code of Md. 1878, p. 389, §§ 35, 36. The fact that the oath was taken can only be established by a formal indorsement upon the mortgage; it is not the subject of parol proof. *Reiff v. Eshleman*, 52 Md. 582. The affidavit need not be in the words prescribed by statute, but it is sufficient that it is of equivalent import and effect. *Stanhope v. Dodge*, 52 Md. 483.

¹ *Stearns v. Porter*, 46 Conn. 313.

² The earlier cases in Connecticut are not supported by the later decisions in that state.

Accordingly it is held, contrary to the decisions above noticed, that a reference in a mortgage to a note or bond secured by it, without specifying its contents, is sufficient to put subsequent purchasers upon inquiry as to the contents of the note or bond, and to charge them with notice to the same extent as if the amount and terms of the note or bond had been fully set forth.¹ It is not even necessary that the amount of the note should be specified in the mortgage, when it is otherwise described.²

345. The debt must come fairly within the terms used. — A mortgage, to secure all the debts due from the grantor to the grantee, and all liabilities of the latter as surety for the former, is valid without a more particular description.³ But when it is attempted to describe the debts secured to entitle a debt to the benefit of the security, it must come fairly within the terms used in the mortgage.⁴ A mortgage which correctly described other debts, and then mentioned "a note or notes for about \$350," was held not to include six notes amounting to over \$1,500.⁵ In like manner, a mortgage securing "an account for about \$50" does not include accounts exceeding \$900.⁶ A mortgage to secure a gross sum, which the mortgagee was at liberty to furnish in materials toward the erection of a house for the mortgagor, does not cover a collateral liability assumed by the mortgagee as surety or guarantor for the mortgagor.⁷

A mortgage executed to secure a note for five thousand dollars payable in six months, does not secure a note for three thousand dollars payable in thirty days, if the latter note was given in a new and independent transaction upon the failure of negotiations for a loan of the first mentioned sum.⁸

346. A mortgage to secure an unliquidated debt, as, for instance, an open book account, is good.⁹ So is a mortgage by a trustee to secure the payment of the moneys in his hands belonging to the trust estate, the amount of which is then unascertained. So is a mortgage to secure the fidelity of an agent or

¹ Pike v. Collins, 33 Me. 38.

² Somersworth Sav. Bank v. Roberts, 38 N. H. 22.

³ Vanmeter v. Vanmeters, 3 Gratt. (Va.) 148; Michigan Ins. Co. v. Brown, 11 Mich. 265.

⁴ Turnbull v. Thomas, 1 Hughes, 172.

⁵ Storms v. Storms, 3 Bush (Ky.), 77.

⁶ Storms v. Storms, *supra*.

⁷ Doyle v. White, 26 Me. 341.

⁸ Walker v. Carleton, 97 Ill. 582. See § 378, note, in regard to this case.

⁹ In New Hampshire, where a statute requires that the debt shall be expressed in the mortgage, it cannot be made to cover unliquidated damages. Bethlehem v. Annis, 40 N. H. 34.

factor;¹ or a mortgage to secure any balance that may remain after application to the debt of moneys that may be collected upon other securities held by the creditor.² A description of a debt secured by the mortgage as a certain sum, "or thereabout," is sufficient to put a person upon inquiry as to the amount of the incumbrance, and the mortgage is good for a sum not very materially larger than that mentioned.³

Although a mortgage be given for a definite sum, it is competent to prove by parol that it was given to secure an open account, the balance of which is continually varying.⁴ A mortgage to secure future and contingent debts is good against a prior unregistered mortgage.⁵

If a mortgage be given to secure an unliquidated debt, or an unadjusted account, or balance of account, the burden is upon the holder of it to produce the accounts and prove what is due.⁶ A sum to be ascertained by an award may be secured by mortgage. But where it was provided that the referees, taking certain data stated in the mortgage as their rule or guide, should make their award and return it in writing to the parties within thirty days after their appointment, the award having failed by reason of the misconduct of the arbitrators, it was held that the mortgage was security for the amount of an award to be made in this manner, and that the mortgagees could not have relief in equity upon a bill for a sale of the mortgaged property.⁷

347. Antecedent debt. — Whether a mortgage given to secure an antecedent debt entitles the mortgagee to the position of a purchaser for value is a question elsewhere considered,⁸ upon which the adjudications are not in harmony. A recital in the mortgage that the mortgagor is indebted to the mortgagee in a certain sum, for which "he has given his checks," does not imply that the mortgage was given for an antecedent debt.⁹

348. A mortgage given as security for a larger indebtedness, such as one given to secure the sum of \$3,000, when the mortgagor was indebted to the mortgagee in the sum of \$10,000 and upwards, the balance of an account current between them, was objected to on the ground that the mortgagee could not, un-

¹ *Stoughton v. Pasco*, 5 Conn. 442.

² *Clarke v. Bancroft*, 13 Iowa, 320.

³ *Booth v. Barnum*, 9 Conn. 286.

⁴ *Esterly v. Purdy*, 50 How. (N. Y.)
Pr. 350.

⁵ *Moor v. Ragland*, 74 N. C. 343.

⁶ *De Mott v. Benson*, 4 Edw. (N. Y.)
297.

⁷ *Emery v. Owings*, 7 Gill (Md.), 488.

⁸ See §§ 458-460.

⁹ *Winchester v. Baltimore & Susquehanna R. R. Co.* 4 Md. 231.

der the recording system, be allowed to take a mortgage to secure a part of the debt, and hold it as a valid security on the property until the whole debt is paid. The objection was not to any uncertainty in the debt intended to be secured, but rather to the application of subsequent payments made by the debtor, without any specific direction at the time as to their application. But it was held that the payments were properly applicable to the unsecured part of the debt, and that the mortgage remained a valid security for the remainder of the debt.¹ Though given for a greater sum than the amount due, the mortgage, in the absence of any fraudulent intent, is valid to that extent.²

349. Description of note.³— It is not necessary that the mortgage should describe the note secured with the utmost particularity, but only so that it may be reasonably identified. The omission in the mortgage of the words “or order,” in describing a note payable to the mortgagee or order, is not such a variance as to render the note inadmissible in evidence.⁴ A mortgage conditioned to pay a note in a certain penal sum, when in fact the note was without penalty, is not invalid for want of reasonable certainty. The whole sum of the penalty may be due, and no one could be misled except through his own negligence to make inquiry as to the amount due.⁵ A condition that the mortgage shall be void upon the payment of the notes described in another mortgage referred to by date and record in another county of the state, sufficiently indicates the amount secured, and is valid.⁶ A mortgage is sufficient which refers to a note which had been made out but not signed, and which, by mistake or fraud, never was signed though it was agreed that it should be executed.⁷

A mortgage conditioned to pay whatever sum the mortgagor might owe the mortgagee, either as maker or indorser of any notes or bills, bonds, checks, over-drafts, or securities of any kind given by him, according to the conditions of any such writings obligatory, executed by him to the mortgagees as collateral security, was held to secure only such debts as were evidenced by writing.⁸

The recitals in a mortgage are competent evidence against the

¹ *Chester v. Wheelwright*, 15 Conn. 562.

² *Gordon v. Preston*, 1 Watts (Pa.), 385.

³ See § 71.

⁴ *Hough v. Bailey*, 32 Conn. 288.

⁵ *Frink v. Branch*, 16 Conn. 260.

⁶ *Kellogg v. Frazier*, 40 Iowa, 502.

⁷ *Volmer v. Stagerman*, 25 Minn. 234.

⁸ *Walker v. Paine*, 31 Barb. (N. Y.) 213.

mortgagor, to prove the consideration of the note described in it.¹ It will be presumed that a "note," referred to in a mortgage or deed of trust, is not under seal.²

350. It is not necessary that all the particulars of the note or other obligation secured by a mortgage should be specified in the conditions of it, in order to identify it as the note intended to be secured. If the paper offered in evidence agrees with the description contained in the mortgage so far as that goes, only that this description is not complete, the possession and production of the instrument is *primâ facie* evidence that it is the same mentioned in the condition. If, however, the description in the condition varies from the paper offered in evidence in certain particulars, then the mere possession of it might not furnish even *primâ facie* evidence that it is the obligation intended to be secured.³ It is only necessary that the mortgage should state correctly sufficient facts to identify the paper with reasonable certainty; and then if some particulars of the description do not correspond precisely with the instrument produced it is not material. This is illustrated by the case of a mortgage to secure "a certain promissory note made and delivered on or about the eighth day of August, 1867 . . . payable on or about one year from date, to the N. W. U. P. Company," signed by three persons, for a sum named. In a foreclosure suit, the note produced was dated August 6, 1867, payable on or before September 1, 1868, to the Northwestern Union Packet Company, at the National Bank of La Crosse, and was for the same sum and signed by the same persons named in the mortgage; but there was a condition inserted that it might be paid by the delivery of a barge in lieu of money. The note was admitted in evidence as sufficiently identified by the description in the mortgage.⁴

But when a note agrees in some respects with the description, though it varies in others, it may be proved by parol to be the one intended in the mortgage.⁵ If, however, the note produced be

¹ Warner v. Brooks, 14 Gray (Mass.), 107.

² Jackson v. Sackett, 7 Wend. (N. Y.) 94; Walker v. McConnico, 10 Yerg. (Tenn.) 228.

³ Robertson v. Stark, 15 N. H. 109, 112.

⁴ Paine v. Benton, 32 Wis. 491; and VOL. I. 17

see Williams v. Hilton, 35 Me. 547; Partridge v. Swazey, 46 Me. 414; Johns v. Church, 12 Pick. (Mass.) 557; Boody v. Davis, 20 N. H. 140; McKinster v. Babcock, 26 N. Y. 378; Hurd v. Robinson, 11 Ohio St. 232.

⁵ Stanford v. Andrews, 12 Heisk. (Tenn.) 664.

totally variant from that described in the mortgage, such evidence is inadmissible in an action at law.¹

It is no objection to the validity of a mortgage that it does not state the names of the holders of the notes secured, when they are otherwise identified; and such a mortgage, when duly recorded, is notice to subsequent purchasers of the property of the existence of the notes intended to be secured, and they are bound by the legal effect of the incumbrance.² A mortgage for the payment of debt, according to the condition of a bond recited in the mortgage, will not be avoided in equity for the reason that the day of payment of the bond has already passed. At law the condition being impossible, the deed would be regarded as absolute; but in equity it is a security merely like an ordinary mortgage.³

Where a mortgage was conditioned for the payment of a sum of money on a day named, the year being left blank, according to the tenor of a promissory note for the same sum, and the note was never made, and only a small part of the money loaned, for which a receipt was given, it was considered that the bargain was incomplete, and the mortgage of no effect. It was considered as never having been executed and delivered for the purpose of having effect according to its tenor.⁴

It is not necessary that the mortgage should set forth a literal copy of the note secured by it. It is sufficient to describe its legal effect.⁵

351. The note and mortgage are construed together. When there is any uncertainty as to the amount secured by the mortgage, the notes referred to in it are competent evidence to explain the language as against the mortgagor, or one who purchased the equity of redemption, with notice of the notes intended to be secured; as when the mortgage described the debt as "two promissory notes, bearing even date herewith, for the sum of five hundred dollars, one payable in 1852, and the other in 1853," and the notes were for five hundred dollars each. Such evidence is not contradictory to the language of the mortgage, but explanatory.⁶ Where a mortgage described a bond secured by it as of a certain sum, a bond for a smaller sum, and dated one day later, may be shown in evidence to have been substituted for the bond

¹ *Follett v. Heath*, 15 Wis. 601.

² *Boyd v. Parker*, 43 Md. 182.

³ *Hughes v. Edwards*, 9 Wheat. 489.

⁴ *Parker v. Parker*, 17 Mass. 370.

⁵ *Aull v. Lee*, 61 Mo. 160.

⁶ *Crafts v. Crafts*, 13 Gray (Mass.), 360.

described, and in an action to foreclose, a conditional judgment may be rendered for the amount of such substituted bond.¹

The note and mortgage may supplement each other in stating the debt secured;² as where the mortgage states the rate of interest, which is omitted from the note,³ or where the note provides for interest at ten per cent. per annum, and the mortgage provides for the same rate of interest payable annually; and inasmuch as the mortgage provides for something respecting which the note was silent, the mortgage governs the contract in this respect.⁴ But where a mortgage provides for the payment of a certain sum with interest, and recites that upon such payment the deed, as well as a promissory note for the amount stated, with interest, should be void, but the note makes no mention of interest, parol evidence is admissible to show that the note was the only debt secured by the mortgage.⁵

352. Parol evidence is admissible to identify the note, and show that the note produced is the one referred to in the mortgage.⁶ Such evidence has been admitted to show that a mortgage made to Ebenezer Hall 3d, conditioned for the payment of a note of the same date, in fact secured a note to Ebenezer Hall, which was dated several months earlier.⁷ In the same case a further discrepancy of one thousand years in the date of the note was considered so palpably a mere clerical mistake that no explanation of it was required. In general it may be said that a mortgage is not invalid either between the parties, or as to third persons, on account of uncertainty in the description of the debt, when, upon the ordinary principle of allowing extrinsic evidence to apply a written contract to its proper subject matter, the debt intended to be secured can be shown.⁸ Very considerable latitude has been allowed in admitting evidence to show that securities offered at the trial of an action to foreclose a mortgage are really substitutes for those described in it; and they have been held to

¹ *Baxter v. McIntire*, 13 Gray (Mass.), 168.

² *Leedy v. Nash*, 67 Ind. 311.

³ *Elliott v. Deason*, 64 Ga. 63.

⁴ *Dobbins v. Parker*, 46 Iowa, 357; and see *Mowry v. Sanborn*, 68 N. Y. 153.

⁵ *Hampden Cotton Mills v. Payson*, 130 Mass. 88.

⁶ *Aull v. Lee*, 61 Mo. 160; *Duval v. McLoskey*, 1 Ala. 708; *Bell v. Fleming*,

12 N. J. Eq. 13; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Johns v. Church*, 12 Pick. (Mass.) 557; *Goddard v. Sawyer*, 9 Allen (Mass.), 78; *Jones v. Guaranty & Indemnity Co.* 101 U. S. 622.

⁷ *Hall v. Tufts*, 18 Pick. (Mass.) 455.

⁸ *Gill v. Pinney*, 12 Ohio St. 38; *Tousley v. Tousley*, 5 Ib. 78; *Hurd v. Robinson*, 11 Ib. 232.

be secured by it, although not corresponding in any particular with those described in the mortgage.¹

A mortgage which recited that it was given to secure the payment of a note described, "and also in consideration of the further sum of \$500," paid to the mortgagor, was held to be security for the sum of \$500 in addition to the note. Parol evidence of this further indebtedness of \$500 was allowed, as not enlarging the terms of the mortgage, but simply showing the true amount. A mortgage conditioned to pay a certain sum, and also to secure a bond, the condition of which covers all liabilities of the debtor to the mortgagee, is construed to cover all indebtedness under the bond, the amount and nature of which may be shown by parol.²

353. A deed of trust or mortgage is valid without any note or bond,³ although it purports to secure a note or bond, and substantially describes it. An alteration of the note secured, not fraudulently made, though it may destroy the written evidence of the debt, does not affect the mortgage.⁴ The mortgage debt exists independently of the note. The inquiry is, Does the debt exist? If it does, it is not essential that there should be any evidence of it beyond what is furnished by the recitals of the deed.⁵ The validity of a mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond or otherwise; it depends rather upon the existence of the debt it is given to secure.⁶ Although there be no note or bond, and no time is specified for the payment of the mortgage debt, the mortgage, if given to secure a debt that actually exists, is valid, and may be enforced immediately.⁷

If a mortgage be taken to secure the payment of an account for present and future advances, a promissory note taken for a part of such advances is entitled to a proportionate part of the mortgage security.⁸

¹ *Baxter v. McIntire*, 13 Gray (Mass.), 168, per Dewey, J.

² *Babcock v. Lisk*, 57 Ill. 327; *New Hampshire Bank v. Willard*, 10 N. H. 210.

³ *Smith v. People's Bank*, 24 Me. 185; *Mitchell v. Burnham*, 44 Me. 286; *Goodhue v. Berrien*, 2 Sandf. (N. Y.) Ch. 630.

⁴ *Clough v. Seay*, 49 Iowa, 111.

⁵ *Eacho v. Cosby*, 26 Gratt. (Va.) 112; and see *Flagg v. Mann*, 2 Sumn. 486, 534; *Goodhue v. Berrien*, 2 Sandf. (N.

Y.) Ch. 630; *Burger v. Hughes*, 5 Hun (N. Y.), 180.

⁶ *Hodgdon v. Shannon*, 44 N. H. 572; *Griffin v. Cranston*, 1 Bosw. (N. Y.) 281; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Farmers' Loan & Trust Co. v. Curtis*, 7 N. Y. 466; *Contant v. Servoss*, 3 Barb. (N. Y.) 128.

⁷ *Brookings v. White*, 49 Me. 479; *Carnall v. Duval*, 22 Ark. 136.

⁸ *Adger v. Pringle*, 11 S. C. 527.

354. The lien of a mortgage is not affected by a clerical inaccuracy in the description of the debt; as, for instance, in the date of the note secured, or in time of its payment.¹ The amount of the bond secured by a mortgage having been left blank, and the mortgage having been recorded without the blank being filled, the mortgagor afterwards executed a writing under seal, stating that the sum, two thousand dollars, was omitted and should have been inserted, and this writing was attached to the page on which the registry was made. This was held to be a sufficient record as against a subsequent mortgage.² A mistake in describing the mortgage note does not ordinarily invalidate the security.³

A description in a deed of trust of the debt secured as being a note signed by the maker and indorsed by another, may be corrected in equity so as to cover a bond signed by the principal, and also signed by a surety as such.⁴

355. The renewal of the original note of the mortgagor does not affect the security.⁵ But a mortgage given to secure the payment at maturity, of the notes of another, does not secure renewal notes substituted in place of them. The mortgagor stands in the relation of surety for the debtor, and his obligation cannot be continued without his consent.⁶

It is questioned whether a mortgage can be modified by substituting for a part of the bond secured by it a due bill payable at a different time, and to a different person; it certainly cannot be so changed and the security transferred to the due bill, except upon a clear showing that such was the agreement when the exchange was made.⁷ An agreement that a promissory note shall be substituted for notes of a larger amount already secured by a mortgage, and if paid at maturity shall be considered a payment and discharge *pro tanto* of those notes and of the mortgage, and that the mortgage shall be held as collateral security for the new note, and not be discharged or cancelled until that is paid, does not create a lien upon the mortgaged property to secure its payment. The note is not given in renewal or consolidation of the mortgage notes, or any of them. The relation of the parties is

¹ *Tousley v. Tousley*, 5 Ohio St. 78.

² *Lambert v. Hall*, 7 N. J. Eq. (3 Halst.) 410, 651.

³ *Porter v. Smith* 13 Vt. 492.

⁴ *In re Clarke*, 2 Hughes, 405.

⁵ See §§ 324-342; *Williams v. Starr*,

5 Wis. 534; *Bank of S. C. v. Rose*, 1 Strobb. (S. C.) Eq. 257; *Enston v. Friday*, 2 Rich. (S. C.) 427; *Walters v. Walters*, 73 Ind. 425.

⁶ *Ayres v. Wattson*, 57 Pa. St. 360.

⁷ *Tucker v. Alger*, 30 Mich. 67.

not changed. No new right in the mortgaged property is given, and no new lien is created.¹

356. When several mortgages are made of distinct parcels of land, to secure one and the same debt, they constitute in effect one mortgage, and their unity is determined by the debt secured.² Parol evidence is admissible for this purpose, and whether the debt be described in the same way in the different mortgages or not, it may be shown that they are only additional security for the same debt.³ A mortgage given to secure separate debts to several persons is several in its nature, as much as if several instruments had been simultaneously executed.⁴

357. A mortgage for a specific sum cannot be enlarged or extended, to cover other debts, or further advances,⁵ as against others who have acquired rights in the property. Neither can the mortgagor as against them increase the charge upon the land by confessing judgment, and thus compounding the interest;⁶ or by making the debt payable in gold coin instead of currency;⁷ or by increasing the rate of interest.⁸ The mortgage being given to secure a certain debt is valid for that purpose only; but whatever form the debt may assume, so long as it can be traced, the security remains good for that.⁹

As against the mortgagor, his agreement that the mortgage shall stand as security to the mortgagee for further advancements, although it be oral only, is valid, and after the advances have been made upon the faith of it, a court of equity will not allow the mortgagor to redeem without performing it. It will apply to him the maxim, that he who seeks equity must do equity.

¹ *Howe v. Wilder*, 11 Gray (Mass.), 267.

This agreement was regarded the same as if the mortgagee had said, "Give me your note for \$600; if paid, I will indorse it on the mortgages; if not, the mortgages are to stand as they are."

² See § 135; *Franklin v. Gorham*, 2 Day (Conn.), 142.

³ *Anderson v. Davies*, 6 Munf. (Va.) 484.

⁴ *Gardner v. Diederichs*, 41 Ill. 158; *Thayer v. Campbell*, 9 Mo. 280; *Burnett v. Pratt*, 22 Pick. (Mass.) 556; *Eccleston v. Clipsham*, 1 Saund. 153.

⁵ *Stoddard v. Hart*, 23 N. Y. 556; *Townsend v. Empire Stone Dressing Co.*

6 *Duer* (N. Y.), 208, and cases cited; *Large v. Van Doren*, 14 N. J. Eq. 208. See *Beekman F. Ins. Co. v. First M. E. Church*, 29 Barb. (N. Y.) 658; S. C. 18 How. Pr. 431; *Tunno v. Robert*, 16 Fla. 738; *Perrin v. Kellogg*, 38 Mich. 720.

⁶ *McGready v. McGready*, 17 Mo. 597.

⁷ *Belloc v. Davis*, 38 Cal. 242; *Taylor v. Atlantic & Great Western Ry. Co.* 55 How. (N. Y.) Pr. 275. See, however, *Poett v. Stearns*, 31 Cal. 78.

⁸ *Burchard v. Frazer*, 23 Mich. 224.

⁹ §§ 924-942; *Patterson v. Johnston*, 7 Ohio, 225; *Van Wagner v. Van Wagner*, 7 N. J. Eq. (3 Halst.) 27. And see *Jagger Iron Co. v. Walker*, 76 N. Y. 521; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164.

It will also apply the same rule to any one claiming under him with notice. Therefore, where the assignees in insolvency of the mortgagor have conveyed the equity of redemption to his wife, without consideration and with notice of such agreement, a court of equity will decline to aid her to redeem the mortgage in violation of this contract.¹ So, in answer to a bill in equity by an assignee in bankruptcy to redeem a mortgage, it is competent for the holder of the mortgage to show that the bankrupt had, for a valuable consideration, orally agreed that a mortgage made by him to another person, and paid in large part, should not be discharged, but should be assigned to the creditor as security for further loans and debts. Such oral agreement could not be set up against a subsequent mortgagee, or against an attaching creditor; nor could it be set up against the mortgagor or his assignee in a suit at law, but it may be in equity.²

But in Pennsylvania the courts say they will not tolerate an oral mortgage or secret lien; and therefore where the mortgage has been given by tenants in common, to secure a partnership debt, the mortgage cannot after payment be kept alive as security for an individual debt of one of them to the mortgagee, even as against his interest.³

358. Taxes and assessments.⁴ — There is an apparent exception to the rule that the mortgage debt cannot, as against third persons, be increased after the execution of the mortgage; and that is, that money paid by the mortgagee, to redeem the premises from a tax sale, or from any charge which is a paramount lien upon the property, becomes a part of the mortgage debt, and may be enforced by foreclosure.⁵ The mortgage is usually so drawn that in terms it includes under the security any payments that may be made by the mortgagee in consequence of any default of the mortgagor. But without any such provision, the payment by the mortgagee of charges which are a prior lien, and the removal of which is essential to his own pro-

¹ *Stone v. Lane*, 10 Allen (Mass.), 74; and see *Joslyn v. Wyman*, 5 Allen (Mass.), 62; *Crafts v. Crafts*, 13 Gray (Mass.), 360.

² *Upton v. Nat. Bank of South Reading*, 120 Mass. 153.

³ *Thomas's Appeal*, 30 Pa. St. 378, reversing 3 Phila. 62; *S. C.* under name *Pechin v. Brown*, dissenting opinion, p.

99; and to same effect, see *O'Neill v. Capelle*, 62 Mo. 202.

⁴ See §§ 77 & 1134.

⁵ *Wright v. Langley*, 36 Ill. 381; *Mix v. Hotchkiss*, 14 Conn. 32; *Hill v. Eldred*, 49 Cal. 398; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Faure v. Winans*, Hopk. (N. Y.) 283; *Kortright v. Cady*, 23 Barb. (N. Y.) 490; *S. C.* 5 Abb. Pr. 358; *Robinson v. Ryan*, 25 N. Y. 320.

tection and safety, gives him in equity not only a right to retain the amount paid out of the proceeds of the land when sold upon foreclosure, as against the mortgagor,¹ but also preference by way of subrogation over even prior incumbrancers, who have been protected by such payment.²

If, however, the mortgage contains no covenant for the payment of taxes, and the mortgagor conveys the equity of redemption, the grantee assuming the mortgage, and afterwards the property becomes incumbered by taxes which the mortgagee is forced to pay, upon a foreclosure of the mortgage, in determining the deficiency for which the mortgagor is liable, the amount paid by the mortgagee for taxes cannot be deducted from the proceeds of the sale, because the mortgagor is not bound to pay the taxes after his conveyance.³ Taxes and assessments upon mortgaged lands, whether ordinary taxes, or assessments for sewers or the like, and water rates, are preferred debts under the bankrupt and insolvent laws. If, therefore, such taxes and assessments be laid upon mortgaged land before the bankruptcy of the owner, they should be paid by the assignee in full out of the estate in his hands in exoneration of the mortgage.⁴ If the mortgaged premises be foreclosed and purchased by the mortgagee, he is still entitled, upon application to the bankruptcy court, to have an order directing the assignee to pay the taxes in full out of the bankrupt's estate. Although the law make the taxes a lien upon the premises in respect of which they are levied and made, yet they are personal debts of the owner of the premises, and can be collected from his personal property. If the taxes be not paid and the land be sold to pay them, the sale would be a sale to satisfy a liability of the bankrupt. No formal proof of the debt is necessary before granting such application.

A water tax which becomes due upon the mortgaged premises after the adjudication of bankruptcy, should be paid by the assignee as a part of the proper expenses of his administration of the estate.⁵

359. Solicitor's fee. — In addition to the mortgage debt, the

¹ *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. 370; *Rapelye v. Prince*, 4 Hill (N. Y.), 119; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118. *Contra*, *Savage v. Scott*, 45 Iowa, 130. But a later case in Iowa leaves the question in doubt in that state. *Barthell v. Syverson*, 54 Iowa, 160.

² § 1080; *Cook v. Kraft*, 3 Lans. (N. Y.) 512. *Contra*, *Manning v. Tuthill*, 30 N. J. Eq. 29; S. C. 7 Reporter, 212.

³ *Marshall v. Davies*, 16 Hun (N. Y.), 606.

⁴ *In re Moller*, 8 Benedict, 526.

⁵ *In re Moller*, *supra*.

mortgage may be made to secure the payment of a reasonable fee of a solicitor, in case of a foreclosure of the mortgage.¹ The amount of such fee may be specified in the mortgage, or left to the discretion of the court. The stipulation may be enforced as well against subsequent purchasers and incumbrancers as against the mortgagor himself.² Such fee is presumed to be in addition to the taxable costs allowed by law.³ Such a stipulation, if not unreasonable in amount, has been regarded as imposing a penalty, rather than as giving compensation to the mortgagee for expenses incurred in consequence of the mortgagor's default.⁴ Equity will not relieve against such a contract fairly entered into, unless, under the color of a provision for the costs and expenses of enforcing the mortgage lien, an unreasonable and oppressive exaction be made of the debtor, so that the stipulation amounts, in fact, to a penalty, which he incurs by his default. In such case equity will interpose her shield to protect the debtor.⁵ If, however, the provision be a reasonable compensation to the mortgagee for expenses that may be incurred by the default of the mortgagor, it is a proper addition to the mortgage debt, and it is not collected as costs, but is a part of the judgment to which the mortgagee is entitled.⁶ The lien of the mortgage covers such a provision as much as the debt itself; and it also attaches equally to the costs of suit, and to expenses necessarily incurred in enforcing the mortgage, although not specially provided for in the mortgage.⁷

360. Tacking other debts.⁸—The mortgagee cannot tack to his mortgage any debt not secured thereby, and require its payment by the mortgagor as a condition to his right to redeem.⁹ A mortgage executed to secure the payment of notes of a definite amount cannot, after the payment of the notes, be made availa-

¹ See § 635; *Bronson v. La Crosse R. R. Co.* 2 Wall. 283; *Rice v. Cribb*, 12 Wis. 179; *Hitchcock v. Merrick*, 15 Wis. 522. See, however, *Sage v. Riggs*, 12 Mich. 313.

² *Pierce v. Kneeland*, 16 Wis. 672.

³ *Hitchcock v. Merrick*, 15 Wis. 522.

⁴ *Daly v. Maitland*, 88 Pa. St. 384; S. C. 13 West. Jur. 204, overruling *Robinson v. Loomis*, 51 Pa. St. 78, which declared the stipulation not to be a penalty. See, also, *Renshaw v. Richards*, 30 La. Ann. 398. The stipulation in these latter

cases was five per cent. But in *Daly v. Maitland*, *supra*, where the mortgage was for \$14,000, the court declared five per cent. to be unreasonable, and suggested that two per cent. would be ample.

⁵ *Daly v. Maitland*, *supra*.

⁶ *Daly v. Maitland*, *supra*. See, however, *Alexandrie v. Saloy*, 14 La. Ann. 327.

⁷ *Hurd v. Coleman*, 42 Me. 182.

⁸ See § 1081.

⁹ *Bacon v. Cottrell*, 13 Minn. 194; *Barthell v. Syverson*, 54 Iowa, 160.

ble to secure further advances, unless it is so provided in the mortgage, or by a legal contract between the parties.¹ A verbal agreement is insufficient for that purpose. But when such was the purpose of the mortgage in the beginning, there is no objection that it secures an existing demand and also future advances.²

A penalty of twenty per cent. imposed by statute for omitting prompt payment of school money loaned upon mortgage, is not a lien under the mortgage, but is imposed upon the borrower only.³ Under a mortgage to a building association, expressly securing only monthly payments, the payment of fines and other dues to the association is not secured.⁴

361. Increasing the rate of interest.—The parties to a mortgage cannot, as against subsequent parties in interest, stipulate by an unrecorded agreement for a higher rate of interest than that provided in the mortgage as recorded, nor can they by such means incorporate into the mortgage any additional indebtedness. The interest cannot be changed from currency to gold, which is then at a premium.⁵ A subsequent mortgagee or purchaser has the right to redeem, by paying the amount due according to its terms.⁶ But the owner of the equity of redemption may bind himself and charge the land for the payment of an increased rate of interest by an agreement in writing.⁷ There must be, however, a consideration to support his agreement. Future indulgence of the debtor for an indefinite period, his debt being already due, is consideration enough.⁸

362. Redelivery of mortgage for a new obligation.—Generally it is held that a mortgage which has been satisfied and delivered up to the mortgagor without being cancelled may be again delivered by him as a valid security, except as against intervening securities. The delivery of the security gave it efficacy in the beginning; and if, after having used it for one purpose, he redeliver it for another purpose, the redelivery gives it vitality again.⁹

363. A mortgage already recorded may be made to secure

¹ Johnson v. Anderson, 30 Ark. 745.

² § 1078; North v. Crowell, 11 N. H. 251.

³ Bradley v. Snyder, 14 Ill. 262.

⁴ Hamilton Building Ass'n v. Reynolds, 5 Duer (N. Y.), 671.

⁵ Taylor v. Atlantic & Great Western Ry. Co. 55 How. (N. Y.) Pr. 275.

⁶ Gardner v. Emerson, 40 Ill. 296.

⁷ Smith v. Graham, 34 Mich. 302.

⁸ Taylor v. Thomas, 61 Ga. 472.

⁹ §§ 947, 948; Underhill v. Atwater, 22 N. J. Eq. 16, per Zabriskie, Chancellor.

a further sum, by an indorsement upon the mortgage executed and acknowledged with the usual formalities of a deed, and recorded with a proper reference to the record of the mortgage. This has been done where the mortgage was given to secure an acceptor of drafts, and by such an indorsement it was made to apply in all its provisions and terms as security for other drafts. The record of the indorsement made a valid extension of the condition of the mortgage as first made and recorded to the further liability incurred by the mortgagee.¹

2. *Future Advances.*

364. In general. — There has been much diversity of opinion among courts and law writers on the question of the validity of mortgages to secure future advances, and as to the rights of mortgagees under such mortgages against subsequent purchasers and incumbrancers. Although the record must show the existence of the mortgage in order to avail anything as a notice, yet it is generally conceded that it need not show the exact amount of the incumbrance. But while according to some authorities the limit of these advances should be named, so that an inquirer may know that the incumbrance cannot exceed a certain amount,² according to others there is no necessity for limiting the amount of the intended advances in any way.³ But even where a limitation is necessary in order to constitute a continuing security which will not be affected by subsequent conveyances, a recorded mortgage for an unlimited sum is notice to a subsequent incumbrancer as to all sums advanced upon the mortgage before the subsequent lien attached. Moreover, the record of the subsequent mortgage is no notice to such prior mortgagee that any subsequent lien has attached.⁴ The subsequent mortgagee can limit the credit that may be safely given under the mortgage for future advances only by giving the holder of it express notice of his lien, and a notice also that he must make no further advances on the credit of that mortgage.⁵ The mortgage will then stand as security for the real equitable claims of the mortgagee, whether they existed at the date of the mortgage or arose afterwards, but prior to the receipt

¹ Choteau v. Thompson, 2 Ohio St. 114.

² Bell v. Fleming, 12 N. J. Eq. 13; S. C. 1b. 490; Beekman v. Frost, 18 Johns. (N. Y.) 544.

³ Witczinski v. Everman, 51 Miss. 841; Lovelace v. Webb, 62 Ala. 271.

⁴ See Robinson v. Williams, 22 N. Y. 380; and § 372.

⁵ McDaniels v. Colvin, 16 Vt. 300; Ward v. Cooke, 17 N. J. Eq. 93. See § 371.

of such notice.¹ If such mortgagee is not under any obligation to make advances, and after notice of a subsequent mortgage does make further advances, to the extent of such advances the subsequent mortgagee has the right of precedence.² But if such mortgagee is under obligation to make the advances, he is entitled to the security whatever may be the incumbrances subsequently made upon the property, and whether he has notice of them or not.³

365. Mortgages to secure future advances have always been sanctioned by the common law. An early case is thus stated in Viner's Abridgment: A. mortgages to B. for a term of years to secure a certain sum of money already lent to the mortgagor, as also such other sums as should thereafter be lent or advanced to him. Afterwards A. makes a second mortgage to C. for a certain sum, with notice of the first mortgage, and then the first mortgagee, having notice of the second mortgage, lends a further sum. The question was, upon what terms the second mortgagee should be allowed to redeem the first; and Cowper, the Lord Chancellor, held that he should not redeem without paying all that was due, as well the money lent after as that lent before the second mortgage was made; "for it was the folly of the second mortgagee, with notice, to take such a security."⁴ This case, however, was critically examined by Lord Chancellor Campbell, before the House of Lords, in the case of *Hopkinson v. Rolt*,⁵ and he declared the representation made by the reporters, that the first mortgagee had notice of the second mortgage, to be without foundation. The doctrine supposed to have been laid down in *Gordon v. Graham* is declared unsound, and is overruled; and the doctrine in England is therefore settled, that a first mortgagee cannot claim the benefit of the security for optional advances made by him after notice of a second mortgage upon the property.⁶ This question is examined elsewhere;⁷ and

¹ *Ripley v. Harris*, 3 Biss. 199; *Nelson v. Boyce*, 7 J. J. Marsh. (Ky.) 401; *Speer v. Whitfield*, 10 N. J. Eq. (2 Stockt.) 107; *Farnum v. Burnett*, 21 N. J. Eq. 87; *Buchanan v. International Bank*, 78 Ill. 500.

² *Frye v. Bank of Ill.* 11 Ill. 367; *Spader v. Lawler*, 17 Ohio, 371. This decision was based somewhat upon the effect of the statute of that state relating to mortgages. *Ladue v. Detroit & Milwaukee R. R. Co.* 13 Mich. 380.

³ See § 372.

⁴ *Gordon v. Graham*, 7 Vin. Abr. 52, pl. 3; 2 Eq. Cas. Abr. 598.

⁵ 9 H. L. Cas. 514; S. C. 7 Jur. N. S. 1209.

The English cases are carefully reviewed in *Rolt v. Hopkinson*, 25 Beav. 461.

⁶ The opinion of the court was delivered to this effect by Lords Campbell and Chelmsford; but Lord Cranworth gave a

⁷ See §§ 368-374.

these two cases are referred to in this connection as the leading cases in England upon the subject, and as showing that future advances may be secured if the mortgage be properly made for that purpose.¹

In this country mortgages made in good faith for the purpose of securing future debts have generally been sustained, both in the early and in the recent cases.² It does not matter that the future advances are to be made to a third person, or for his benefit at the request of the mortgagor.³ Neither is the validity of a mortgage to secure future advances affected by the fact that the advances are to be made in materials for building instead of money.⁴

366. Statutory requirements. — In Maryland it is provided by statute that no mortgage, or deed in the nature of a mortgage, shall be a lien or charge on any estate or property for any other or different principal sum or sums of money than appear on the face of the mortgage, and are specified and recited in it, and particularly mentioned and expressed to be secured thereby at the time of executing it; and further, that no mortgage, or deed in the nature of a mortgage, shall be a lien or charge for any sum or sums of money to be loaned or advanced after the same is executed, except from the time said loan or advance is actually made; and that no mortgage to secure such future loans or advances shall be valid unless the amount or amounts of the same, and the times when they are to be made, shall be specifically stated in said mortgages.⁵ This provision is not, however, applicable to mort-

dissenting opinion, to the effect that the law was correctly laid down by Lord Cowper, as reported.

¹ See, also, *Burgess v. Eve*, L. R. 13 Eq. 450; *Daun v. City of London Brewery Company*, L. R. 8 Eq. 155; *Menzies v. Lightfoot*, L. R. 11 Eq. 459.

² *United States v. Hooe*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34; *National Bank v. Whitney*, 103 U. S. 99; *Jones v. Guaranty & Indemnity Co.* 101 U. S. 622; S. C. 2 Fed. Rep. 747; *Schuelenburg v. Martin*, 1 McCrary, 348; *Leeds v. Cameron*, 3 Sum. 488; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *Goddard v. Sawyer*, 9 Allen (Mass.), 78; *Truscott v. King*, 6 N. Y. 147; *James v. Morey*, 2 Cow. (N. Y.) 246, 292; *Brinckenhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65, 73; *Fassett v. Smith*, 23 N. Y. 252;

Brackett v. Sears, 15 Mich. 244; *Seaman v. Fleming*, 7 Rich. (S. C.) Eq. 283; *Garber v. Henry*, 6 Watts (Pa.), 57; *McCarty v. Chalfant*, 14 W. Va. 531; *Klein v. Glass*, 53 Tex. 37; *Jones on Chattel Mortgages*, §§ 94-98.

³ *Maffitt v. Rynd*, 69 Pa. St. 380, and cases cited.

⁴ *Brooks v. Lester*, 36 Md. 65; *Doyle v. White*, 26 Me. 341.

⁵ *Laws 1872*, ch. 213; R. Code, 1878, art. 66, § 43. This restriction does not apply to mortgages to indemnify the mortgagee against loss from being indorser or security, nor to any mortgages given by brewers to maltsters to secure the payment to the latter of debts contracted by the former for malt and other material used in the making malt liquors.

This amendment and addition to the

gages given to indemnify the mortgagee against loss from being indorser or security. A mortgage to secure future advances not to exceed a limited amount may be enforced to the amount of the advances made upon it within that limit, although such advances were made after the mortgagee had received notice of a junior incumbrance.¹ The statute requiring the amount to be stated is a modification of the common law, under which the mortgage would be equally valid without such limitation.

In New Hampshire it is provided that no conveyance in writing of any lands shall be defeated, nor any estate incumbered by any agreement, unless it is inserted in the condition of the conveyance and made a part thereof, stating the sum of money to be secured, or other thing to be performed. And it is also provided that no estate conveyed in mortgage shall be holden by the mortgagee for the payment of any sum of money, or the performance of any other thing, the obligation or liability to the payment or performance of which arises, is made, or contracted after the execution and delivery of such mortgage.² It is held, however, that a mortgage executed in good faith, conditioned to secure a definite sum, part of the consideration of which is the agreement of the mortgagee to pay certain sums to and for the use of the mortgagor, and to perform certain labor for the mortgagor, is neither prohibited nor fraudulent as against the creditors of the mortgagor.³ But the court did not wish to be understood as holding that a mortgage given to secure an absolute note, intended as a security for advances hereafter to be made, would be valid, if at the time of the execution of the mortgage the amount of the advances was not agreed upon, or the mortgagee was under no obligation to make them. Under this statute the mortgage may be void as to the part of the consideration which is altogether future, but valid for the part which was a debt at the time the mortgage was executed.⁴

In Georgia a mortgage may be made to secure future advances not limited in amount,⁵ although the statute of the state provides

Code does not apply to the counties of Anne Arundel, Baltimore, St. Mary's, and Prince George's counties.

¹ *Wilson v. Russell*, 13 Md. 494.

² G. S. c. 122, §§ 2 & 3; G. L. 1878, c. 136, §§ 2 & 3.

³ *Stearns v. Bennett*, 48 N. H. 400, 402.

⁴ *Leeds v. Cameron*, 3 Sum. 488; *Johnson v. Richardson*, 38 N. H. 353; *New Hampshire Bank v. Willard*, 10 N. H. 210.

⁵ *Allen v. Lathrop*, 46 Ga. 133. The debt was described as advances in supplies and money for the purpose of carrying on the farm for the year 1870.

that a mortgage shall "specify the debt to secure which it is given."¹ So long as the means for determining the amount of the debt are pointed out, it is immaterial that the amount is not stated, or is from its very nature indefinite.²

367. The future liabilities intended to be secured should be described with reasonable certainty. If the nature and amount of the incumbrance is so described that it may be ascertained by the exercise of ordinary discretion and diligence, this is all that is required.³ On this principle a mortgage for the payment of such sums of money as the mortgagee might advance, in pursuance of an agreement mentioned in the condition of a certain bond given by the mortgagee to the mortgagor of even date, contains reasonable notice of the incumbrance.⁴

A mortgage for \$200 was executed as a basis of credit to that extent for goods which the mortgagee might sell to the mortgagor, with the understanding that the mortgagor should make such payments that the balance against him should at no time exceed that amount. An account was opened and continued for some years. It was held that the condition of the mortgage was not exceptionable as not disclosing, with sufficient certainty, the nature and extent of the incumbrance.⁵ When the condition of

¹ Code, § 1945.

² *Allen v. Lathrop*, *supra*.

³ *United States v. Hooe*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34; *United States v. Sturges*, 1 Paine, 525; *Hubbard v. Savage*, 8 Conn. 215. This case did away with the doubt with which such mortgages were spoken of in the earlier cases of *Pettibone v. Griswold*, 4 Conn. 158; *Stoughton v. Pasco*, 5 Conn. 442; *Shepard v. Shepard*, 7 Conn. 387; *Brewster v. Clamfit*, 33 Ark. 72.

⁴ *Crane v. Deming*, 7 Conn. 38.

⁵ *Mix v. Cowles*, 20 Conn. 420.

Where the mortgagor, being insolvent, made a mortgage to secure a note of \$2,600, to a creditor to whom he was indebted in the sum of \$1,500, and who was surety for him in the sum of \$1,100 more, the mortgage was held a valid security for the \$1,500, but, as against the mortgagor's creditors, not for the part which was intended to indemnify the mortgagee against his liabilities as surety, because that is a claim not described in the mortgage; and the real nature of the transac-

tion should appear in the condition of the mortgage. *Sanford v. Wheeler*, 13 Conn. 165. On this principle the same court held, in *North v. Belden*, 13 Conn. 376, that a mortgage to secure a note of \$500, when in fact the mortgage was intended as security for such indorsements as the mortgagee might make for the mortgagor to that amount, and which were actually made and the notes paid by the mortgagee, was not valid against subsequent incumbrances. And so a condition to pay all notes which the mortgagee might indorse or give for the mortgagor, and all receipts which the mortgagee might hold against the mortgagor, was held to be too indefinite and uncertain to make the mortgage valid against subsequent parties in interest. There is nothing to limit the liability, or to give others the means of finding out the extent of it. *Pettibone v. Griswold*, 4 Conn. 158.

These cases, however, are questioned, and in effect overruled, in later decisions in Connecticut, and are without general support elsewhere.

a deed was, that "in case the grantor pays to the grantee the sum of \$1,600, with interest, on or before the first of January, 1843, then this deed shall be void and of no effect, otherwise to remain in full force," and the grantor then owed the grantee about \$1,100, and it was agreed that the grantee should advance him a further sum to make up the full amount of the mortgage, it was held that the condition sufficiently described the nature and character of the indebtedness to be secured, to constitute a valid security against subsequent incumbrances.¹

A mortgage conditioned for the payment of all sums due and to become due is sufficiently certain.² So is a mortgage "to secure all past indebtedness due and owing" from the mortgagor to the mortgagee.³ A mortgage conditioned to pay the mortgagee "what I may owe him on book" was construed to refer to future accruing accounts, upon its appearing that there was no account subsisting between the parties when the mortgage was given.⁴ Upon its appearing that the mortgage was given in part to cover future advances, the burden is upon the mortgagee to show what advances have been made.⁵

But it is not to be inferred that it is generally essential that the amount of the intended advances should be stated, or in any way limited. On the contrary, by the weight of authority, mortgages to secure indefinite future advances are valid.⁶

368. Advances made after notice of subsequent liens, upon the same premises, according to some authorities, create a lien subordinate to such subsequent liens.⁷ As will be presently noticed, this general proposition is subject to qualifications; but whenever a subsequent mortgage has precedence, as a general rule a subsequent judgment has precedence under like circumstances;⁸ but a mortgage for future unlimited advances is good against all advances made before recovery of the judgment.⁹ Advances covered by a mortgage have preference over the claims of junior incumbrancers, who have become such with notice of an

¹ Bacon v. Brown, 19 Conn. 29.

² Michigan Insurance Co. v. Brown, 11 Mich. 266.

³ Machette v. Wanless, 1 Colo. 225.

⁴ McDaniels v. Colvin, 16 Vt. 300.

⁵ Fisher v. Otis, 3 Chand. (Wis.) 83.

⁶ See §§ 373-375; Jarratt v. McDaniel, 32 Ark. 598; Brewster v. Clamfit, 33 Ark. 72.

⁷ Frye v. Bank of Ill. 11 Ill. 367; Spader

v. Lawler, 17 Ohio, 371; Hughes v. Worley, 1 Bibb (Ky.), 200; Bell v. Fleming, 12 N. J. Eq. 13, 490; Hall v. Crouse, 13 Hun (N. Y.), 557; Todd v. Outlaw, 79 N. C. 235.

⁸ Brinckerhoff v. Marvin, 5 Johns. (N. Y.) Ch. 320; Craig v. Tappin, 2 Sandf. (N. Y.) Ch. 78; Yelverton v. Shelden, Ib. 481; Goodhue v. Berrien, Ib. 630.

⁹ Robinson v. Williams, 22 N. Y. 380.

agreement under the mortgage for the advances.¹ Mortgages to secure future advances or liabilities are valid and fixed securities against subsequent purchasers, or attaching creditors of the mortgagor, although the advances are made or the liabilities assumed after the record of such later deeds or attachments; and although it is optional with the mortgagee whether he will make such advancements or assume such liabilities or not, if they are made or assumed in good faith, and without notice of any subsequent intervening incumbrance.²

369. But where the mortgagee is not bound to make the advances or assume the liabilities, and he has actual notice of a later incumbrance upon the property for an existing debt or liability, such later incumbrance will take precedence of the mortgage as to all advances made after such notice.³ Whether constructive notice by the record of the later incumbrance should have the same effect as actual notice, and whether the option of the mortgagee to make the advances should operate to give the mortgage effect as to subsequent incumbrances only from the time the advances are in fact made, are questions upon which the cases are not agreed.⁴ A mortgage was made to secure the mortgagee for his liability as indorser of such notes as the mortgagor might desire him to indorse within a certain time and amount, and at his option to do so. A second mortgage in similar terms was made to another indorser. It was held that the first mortgagee, for such indorsements as he made after actual notice of the incumbrance of the second mortgage, and of the indorsements made under the security of it, should be postponed to such claims under the second mortgage.⁵ The principle of the decision is, that the mortgagee not being *bound* by his contract to make the indorsements or future advances, the equity of a junior incumbrancer for an existing debt, or of an attaching creditor, will intervene and take precedence of any advances made or liabilities incurred after actual notice of the subsequent lien. Such junior incumbrancer or creditor acquires a lien upon the property as it then is; and as it

¹ *Kramer v. Farmers' & Mechanics' Bank of Steubenville*, 15 Ohio, 253; *Truscott v. King*, 6 N. Y. 147.

² *Crane v. Deming*, 7 Conn. 387; *McDaniels v. Colvin*, 16 Vt. 300; *Shirras v. Caig*, 7 Cranch, 34; *Conard v. Atlantic Ins. Co.* 1 Peters, 386; *Truscott v. King*, 6 Barb. (N. Y.) 346.

³ *Boswell v. Goodwin*, 31 Conn. 74; *Ladue v. Detroit & Milwaukee R. R. Co.* 13 Mich. 380, and cases cited; *Brinkmeyer v. Browneller*, 55 Ind. 487; S. C. 4 Cent. L. J. 370.

⁴ See § 372.

⁵ *Boswell v. Goodwin*, 31 Conn. 74.

is optional with the prior mortgagee whether he will advance or indorse any further, he is not allowed knowingly to prejudice the rights of subsequent incumbrancers, or destroy their lien, by adding voluntarily to his own incumbrance. They have an equity superior to his right to make further advances.

370. A mortgage for obligatory advances is a lien from its execution. If by the terms of the mortgage an obligation is imposed upon the mortgagee to make the advances, the mortgage will remain security for all the advances he is required to make, although other incumbrances may be put upon the property before they are made, and he has knowledge of such incumbrances.¹ Thus, where a railroad company made a mortgage to a trustee upon all its property then owned, or afterwards to be acquired, to secure bonds which the company had agreed to issue to a contractor, in part payment for the building of its road, it was held that the mortgage took precedence of a lien for material afterwards furnished the company, and used upon the road, although the advances were made after notice of the material-man's claim of a lien.²

371. *Hopkinson v. Rolt.*³—The question in this case was accurately and tersely stated by Lord Chancellor Chelmsford in the judgment appealed from: "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it: is the prior mortgagee entitled to priority for these advances over the antecedent advance made by the subsequent mortgagee?" In *Gordon v. Graham*,⁴ this question was answered affirmatively; but the House of Lords overruled this case, and answered the question in the negative. Lord Chancellor Campbell forcibly presents the argument for this view of the question.⁵

¹ *Nelson v. Iowa Eastern R. R. Co.* 8 Am. Railroad Rep. 82; *Moroney's Appeal*, 24 Pa. St. 372; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585; *Wilson v. Russell*, 13 Md. 494; *Griffin v. Burtnett*, 4 Edw. (N. Y.) 673; *Crane v. Deming*, 7 Conn. 387; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Brinkmeyer v. Browneller*, 55 Ind. 487; *Lovelace v. Webb*, 62 Ala. 271; *Ackerman v. Hunsicker*, 21 Hun (N. Y.), 53.

² *Nelson v. Iowa Eastern R. R. Co.* *supra*.

³ 9 H. L. C. 514.

⁴ See § 365. This decision had previously been questioned by Mr. Coventry, in a note to Powell on Mort. 534, note (e), and by Lord St. Leonards, 2 Dru. & War. 481; S. C. 6 H. L. C. 589, 597.

⁵ *Hopkinson v. Rolt*, *supra*. "The first mortgagee is secure as to past advances, and he is not under any obligation to

372. A prior mortgagee is affected only by actual notice of a subsequent mortgage, and not by constructive notice from the recording of the second mortgage. Such, it is conceived, is the rule, supported by reason and the weight of authority.¹ Where a person having mortgaged land to secure a present loan and also future advances, afterwards declared a homestead upon it, and subsequently obtained further advances without disclosing the fact that he had declared a homestead, the mortgagee was protected as to such advances made on the faith of the security.² The recording of the declaration is not notice to the prior mortgagee. Nothing short of actual notice to the mortgagee of such declaration would affect him. It is elsewhere observed that the recording acts give notice to subsequent purchasers and incumbrancers, and do not affect those whose rights are already fixed by the previous record of their own deeds.³ Whether the mort-

make any further advances. He has only to hold his hand when asked for a further loan. Knowing the extent of the second mortgage, he may calculate that the hereditaments mortgaged are an ample security to the mortgagees; and if he doubts this, he closes his account with the mortgagor, and looks out for a better security. The benefit of the first mortgage is only lessened by the amount of any interest which the mortgagor afterwards conveys to another, consistent with the rights of the first mortgagee. Thus far the mortgagor is entitled to do what he pleases with his own. The consequence certainly is, that after executing such a mortgage as we are considering, the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagee, may at any time give a preference to the second mortgagee, as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puise* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make further advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee, in making the advances, with notice of the first mortgage; for, by the hypothesis, each has notice of the security of the other, and the first

mortgagee is left in full possession of his option to make or to refuse further advances as he may deem it prudent. The hardship upon bankers from this view of the subject at once vanishes, when we consider that the security of the first mortgage is not impaired without notice of a second, and that when this notice comes, the bankers have only to consider, as they do, as often as they discount a bill of exchange, what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss."

¹ *McDaniels v. Colvin*, 16 Vt. 300; *Truacott v. King*, 6 Barb. (N. Y.) 147, 346; S. C. 6 N. Y. 166; *Ward v. Cooke*, 17 N. J. Eq. 93; *Robinson v. Williams*, 22 N. Y. 380; *Wilson v. Russell*, 13 Md. 494; *Nelson v. Boyce*, 7 J. J. Marsh. (Ky.) 401; *M'Carty v. Chalfant*, 15 W. Va. 514, 548, per *Haymond J.*, but point not decided; *Rowan v. Sharps' Rifle Man. Co.* 29 Conn. 282. In the latter case, however, the advances were obligatory.

² *In re Haake*, 7 N. B. R. 61, 71; S. C. 2 Sawyer, 231, 241.

³ See § 562. See article on this subject 11 Am. Law. Reg. N. S. 273, by Judge Mitchell, the learned editor, who in conclusion remarks: "So far as we may venture a personal opinion, therefore, we think the rule, that the recording of the second mortgage is not notice to the first

gage intended to secure future advances discloses the nature of the transaction or not, there is no good reason why it should not remain a valid security for all advances that may be made, until the mortgagee receives actual notice of subsequent claims upon the property. The burden of ascertaining the amount of an-existing incumbrance should rest upon him who takes a conveyance of the property subject to the mortgage. He has notice by the record of the existence of a mortgage for the full amount of the intended advances; and if he wishes to stop the advances where they are at the time of recording his subsequent deed, it is only reasonable to require him to give actual notice of his claim upon the property; otherwise he should not be heard to complain that the prior incumbrance amounts at any future time to the full sum for which it appeared of record to be an incumbrance.¹

Nevertheless, there are some authorities to the effect that the first mortgagee has constructive notice of the second mortgage from the record of it.² This position is supported by Mr. Justice Christiancy, of Michigan, in an elaborate opinion, in which a mortgage for future optional advances is treated as effectual only from the time the advances are actually made.³

mortgagor is supported by the better reasons, and that the weight of authority is still in its favor, though we are bound to concede that of late there is an apparent tendency to the opposite rule."

¹ *Lovelace v. Webb*, 62 Ala. 271, an important case.

² *Spader v. Lawler*, 17 Ohio, 371, by a divided court; *Bank of Montgomery County's Appeal*, 36 Pa. St. 170; *S. C. sub nomine Parker v. Jacoby*, 3 Grant's (Pa.) Cas. 300; *Ter-Hoven v. Kerns*, 2 Pa. St. 96; *Stone v. Welling*, 14 Mich. 514; *Griffin v. New Jersey Oil Co.* 11 N. J. Eq. 49; *Frye v. Bank of Ill.* 11 Ill. 367, 381; *Ketcham v. Wood*, 22 Hun (N. Y.), 64.

This question was discussed but not decided in *Boswell v. Goodwin*, 31 Conn. 74; *S. C.* 12 Am. Law. Reg. 79, note by Judge Redfield; and see 11 Ib. 1.

³ *Ladue v. Detroit & Milwaukee R. R. Co.* 13 Mich. 380. He says: "The instrument can only take effect as a mortgage or incumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. Until this takes place,

neither the land, nor the parties, nor third persons, are bound by it. It constitutes, of itself, no binding contract. Either party may disregard or repudiate it at his pleasure. It is but a part of an arrangement merely contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties, till subsequently assented to or adopted by both."

As to the inconvenience which is supposed to result to the first mortgagee by requiring him to examine the record every time he makes advances upon such a mortgage, the learned judge says: "It is, at most, but the same inconvenience to which all other parties are compelled to submit when they lend money on the security of real estate,—the trouble of looking to the value of the security. But, in truth, the inconvenience is very slight. Under any rule of decision they would be compelled to look to the record title when the mortgage is originally taken. At the next advance they have only to look back

When there is no obligation upon the mortgagee to make the advances, and the amount of them and the times when they are to be made are not agreed upon, some authorities hold that the mortgage is a lien as against intervening incumbrances, only from the time the advances upon it are made, and not from the time of the execution of the mortgage. This was the decision with reference to a mortgage given to secure the payment of notes and bills to be discounted for the mortgagor, and for all liabilities of every kind he might be under to the mortgagee.¹ When a mortgage is given to secure future accommodation indorsements, the amount of which is wholly undefined, a subsequent mortgage or deed taken in good faith is held to have precedence as to any indorsements made afterwards.²

373. The rule that a mortgage for definite advances has priority in all cases has strong support in recent discussions. Notwithstanding all the distinctions and refinements which have been introduced into the law of this subject by the many conflicting adjudications upon it, there is strong reason and authority for the rule, that a mortgage to secure future advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may by ordinary diligence ascertain the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee had notice of them. If the mortgage contains enough to show a contract between the parties,

to this period; and for any future advance, only back to the last, which would generally be but the work of a few minutes, and much less inconvenience than they have to submit to in their ordinary daily business in making inquiries as to the responsibility, the signatures, and identity of the parties to commercial paper. But if there be any hardship, it is one which they can readily overcome, by agreeing to make the advances; in other words, by entering into some contract, for the performance of which, by the other party, the mortgage may operate as a security. They can hardly be heard to

complain of it as a hardship that the courts refuse to give them the benefits of a contract which, from prudential or other considerations, they were unwilling to make, and did not make until after the rights of other parties have intervened. Courts can give effect only to the contracts the parties have made, and from the time they took effect."

¹ Bank of Montgomery County's Appeal, 36 Pa. St. 170; McClure v. Roman, 52 Ib. 458; Parker v. Jacoby, 3 Grant's (Pa.) Cas. 300.

² Babcock v. Bridge, 29 Barb. (N. Y.) 427.

that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it he is not entitled to protection as a *bond fide* purchaser. Such a mortgage is considered as good against subsequent incumbrances to the full amount of the advances provided for, and the mortgagee is held to have a right to rely upon it, and to make such advances without regard to what other incumbrances may afterwards have been put upon the property.

This view of the doctrine of mortgages to secure future advances is strongly expressed by Mr. Justice Campbell in a recent case in Mississippi.¹

¹ *Witzinski v. Everman*, 51 Miss. 841-845. He says: "There has been much diversity of views between courts and law writers on the question of the validity of mortgages for future advances, and the rights of mortgagees in such mortgages as against purchasers and junior incumbrancers of the mortgaged property. Some have held that a mortgage, which does not specify that for which it is given so distinctly as to give definite information on the face of the mortgage of what it secures, so as to render it unnecessary for the inquirer to look beyond the mortgage and seek information *aliunde*, is void as against creditors and purchasers. Others have held that a mortgage for future advances is valid as to all advances made under it, before notice by the mortgagee of the supervening rights of purchasers or incumbrancers. Others have announced that a mortgage for future advances to be made, or liability to be incurred when duly recorded, is valid as a security for indebtedness incurred under it, in accordance with its terms. There have been suggested modifications of these views, and a distinction has been drawn between mortgages in which the mortgagee is obligated to advance a given sum and those in which he is not so bound. We decline to follow the devious ways to which we are pointed by conflicting adjudications and suggestions, and prefer to pursue the plain path in which principle directs us, and will declare the rule to be observed in the courts of this

state on the subject under consideration, which, strangely enough, has not been heretofore decided in this state. A mortgage to secure future advances, which on its face gives information as to the extent and purpose of the contract, so that a purchaser or junior creditor may, by an inspection of the record, and by ordinary diligence and common prudence, ascertain the extent of the incumbrance, will prevail over the supervening claim of such purchaser or creditor as to all advances made by the mortgagee within the terms of such mortgage, whether made before or after the claim of such purchaser or creditor arose. It is not necessary for a mortgage for future advances to specify any particular or definite sum which it is to secure. It is not necessary for it to be so completely certain as to preclude the necessity of all extraneous inquiry. If it contains enough to show a contract that it is to stand as a security to the mortgagee for such indebtedness as may arise from future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it in the proper quarter, he cannot claim protection as a *bond fide* purchaser. The law requires mortgages to be recorded for the protection of creditors and purchasers. When recorded, a mortgage is notice of its contents. If it gives information that it is to stand as security for all future indebtedness to accrue from the mortgagor to the mortgagee, a person examining the record is put upon inquiry as

374. It is not necessary that the mortgage should express on its face that it is given to secure future advances. It may be given for a specific sum, and it will then be security for a debt to that amount.¹ This definite sum will then limit the extent of the lien. There must be some limit to the amount which the mortgage is to secure, either by express limitation or by stating generally the object of the security. If the limit be not defined in any way, it can be good only for the advances made at the time, and such others as may afterwards be made before any other incumbrances are made upon the property mortgaged.² The sum expressed by the mortgage may cover a present indebtedness as well as future advances, and it is not necessary that the one should be separated from the other on the face of the mortgage.³

An absolute conveyance may be used to secure future advances, or to secure an existing debt and also future advances. The agreement to reconvey when the advances are repaid is sufficient, although it exists in parol only.⁴

375. The agreement under which advances to a certain amount are to be made need not be in writing, to be binding and effectual against subsequent liens. Thus, if a mortgage is

to the state of dealing between the parties, and the amount of indebtedness covered by the mortgage, and is duly advised of the right of the mortgagee, by the terms of the mortgage, to hold the mortgaged property as security to him for such indebtedness as may accrue to him. Thus informed, it is the folly of any one to buy the mortgaged property, or take a mortgage on it, or give credit on it; and if he does so, his claim must be subordinated to the paramount right of the senior mortgagee, who in thus securing himself by mortgage, and filing it for record, as required by law, has advertised the world of his paramount claim on the property covered by his mortgage, and is entitled to advance money and extend credit according to the terms of his contract thus made with the mortgagor, who cannot complain, for such is his contract; and third persons afterwards dealing with him cannot be heard to complain, for they are affected with full notice, by the record, of what has been agreed on by the mortgagor and mortgagee."

Quoted and followed in *Lovelace v. Webb*, 62 Ala. 271.

¹ *Collins v. Carlile*, 13 Ill. 254; *Darst v. Gale*, 83 Ill. 136; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) Ch. 293; *Murray v. Barney*, 34 Barb. (N. Y.) 336; *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78; *Wescott v. Gunn*, 4 Duer (N. Y.), 107; *Walker v. Snediker*, Hoff. (N. Y.) 145; *Townsend v. Empire Stone Dressing Co.* 6 Duer (N. Y.), 208; *Foster v. Reynolds*, 38 Mo. 553; *Griffin v. New Jersey Oil Co.* 11 N. J. Eq. 49; *Forsyth v. Preer*, 62 Ala. 443; *McCarty v. Chalfant*, 14 W. Va. 531; *Hendrix v. Gore*, 8 Oregon, 406.

² *Robinson v. Williams*, 22 N. Y. 380; *Fassett v. Smith*, 23 N. Y. 252.

³ *Tully v. Harloe*, 35 Cal. 302; *Summers v. Roos*, 42 Miss. 749; *Hendrix v. Gore*, 8 Oregon, 406.

⁴ *Harper's Appeal*, 64 Penn. St. 315; *S. C. 7 Phila.* 276; *Rhines v. Baird*, 41 Penn. St. 256; *Kellum v. Smith*, 33 Ib. 158; *Fessler's Appeal*, 75 Ib. 483; *Myers's Appeal*, 42 Ib. 518. See, however, *Metropolitan Bank v. Godfrey*, 23 Ill. 579.

made to secure future advances to be used in the construction of a building on the mortgaged land, and a mortgage for the contemplated amount is made and recorded, it has priority against a mechanic's lien for materials furnished in the construction of such building to the full amount of the mortgage, if the advances are actually made to that amount, although the agreement under which they are made is verbal only.¹ If such agreement be in writing it is not necessary that it should appear of record.²

The agreement for the advances must be contemporaneous: a mortgage cannot be made available to secure future advances by any subsequent parol agreement, in preference to the lien of a junior incumbrance.³

376. The omission to state on the face of the mortgage the time when the first advances are to be made is not material. It is sufficient that they are to be made from time to time, as the mortgagor may desire, during a specified period.⁴ The amounts of the several advances, and the times when they were actually made, and the object of the mortgage, may be shown by extrinsic proof, for in such case the proof does not contradict the mortgage, or alter its legal operation and effect in any way.⁵ Although the deed purports to be in consideration of a definite sum in hand paid at the time, it may be shown by parol evidence that the deed was made to secure advances made and to be made to that extent.⁶

Parol evidence is also admissible to show that the mortgage was given to secure advances to be made by a party not named in the mortgage.⁷

When a mortgage has been given in terms to secure future advances and acceptances, and the mortgagee, in a suit to enforce the mortgage, produces drafts of the mortgagor upon him, there is no presumption that the drafts were drawn against funds of

¹ *Platt v. Griffith*, 27 N. J. Eq. 207. The court, citing *Moroney's Appeal*, 24 Pa. St. 372; *Taylor v. La Bar*, 25 N. J. Eq. 222; *Macintosh v. Thurston*, Ib. 242, remark, that in each of these cases there was a written agreement on the part of the mortgagee binding him to furnish the money, but regard this circumstance as of no consequence. Fully sustained in *Lovell v. Webb*, 62 Ala. 271, 281.

² *Taylor v. Cornelius*, 60 Pa. St. 187; *Moroney's Appeal*, 24 Ib. 372; *Thomas v. Davis*, 3 Phila. (Pa.) 171.

³ *Truscott v. King*, 6 N. Y. 147, 161, per *Jewett, J.*; *Walker v. Snediker, Hoff.* (N. Y.) 145; *Hall v. Crouse*, 13 Hun (N. Y.), 557.

⁴ *Wilson v. Russell*, 13 Md. 494; and see *Ahern v. White*, 39 Md. 409.

⁵ *Hall v. Crouse*, 13 Hun (N. Y.), 557.

⁶ *Foster v. Reynolds*, 38 Mo. 553; *Cole v. Albers*, 1 Gill (Md.), 412.

⁷ *Hall v. Crouse*, 13 Hun (N. Y.), 557. See *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch. 78.

the drawer, but the burden is upon the mortgagor to show this if he makes the claim.¹

377. All limitations of the security must be observed. Although, as already seen, a mortgage made in good faith to secure future debts expected to be contracted, or advances to be made in the course of dealing between the parties, is a good and valid security,² yet if limited by the terms of the mortgage, either as to amount or the time within which the advances are to be made, or the nature of them, the limitation must be strictly observed; thus a mortgage to secure credits or advances to be made within a limited time secures none made afterwards.³

A limitation in terms of the amount of the advances to be made may be controlled by other expressions in the mortgage as to the purpose of the advances; thus where the controlling purpose was to secure advances sufficient to enable the mortgagor to raise a crop of cotton, advances beyond the sum specified were protected.⁴

If limited in amount and time, and the full amount be once advanced and repaid, and further loans are made within the time limited, these are covered by the mortgage as against subsequent purchasers.⁵

378. If the mortgagee advance only a part of the sum contemplated in the mortgage, it is a valid security for so much as he does advance,⁶ and for so much only. Likewise if a mortgage be given for a loan and for the price of lands to be con-

¹ *Lewis v. Wayne*, 25 Ga. 167.

² *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270; *United States v. Hooe*, 3 Cranch, 73; *Shirras v. Caig*, 7 Cranch, 34; *James v. Morey*, 2 Cow. (N. Y.) 246, 292; S. C. 6 Johns. Ch. 417; *Brinckerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65, 73; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) Ch. 293; *Walker v. Snediker*, Hoff. (N. Y.) 145; *Yelverton v. Sheldon*, 2 Sandf. (N. Y.) Ch. 481.

³ *Miller v. Whittier*, 36 Me. 577.

⁴ *Bell v. Radcliff*, 32 Ark. 645.

⁵ *Wilson v. Russell*, 13 Md. 494.

⁶ See *Dart v. McAdam*, 27 Barb. 187; and see *Freeman v. Auld*, 44 Barb. (N. Y.) 14; *Coleman v. Galbreath*, 53 Miss. 303; *Forsyth v. Freer*, 62 Ala. 443. See, in this connection, the case of *Walker*

v. Carleton, 97 Ill. 582, where a loan for \$5,000 had been agreed upon, and a note and trust deed for that sum executed, and the deed recorded, when the lender was able to furnish only \$3,000 of the amount, for which sum he took a separate note payable in a short time. A majority of the court held that the trust deed did not secure the smaller note.

This decision seems to be erroneous. *Craig, Scott, and Sheldon, J.J.*, dissenting, take the correct view of the case when they say: "Equity regards substance, not form. The substance of the transaction was that there was but \$3,000 furnished, instead of \$5,000, and the former was accepted in lieu of the latter; and the trust deed to the extent of \$3,000, was valid and enforceable."

veyed, and the mortgagee wrongfully refuses to convey the land, the mortgage can be enforced only for the money advanced.¹

When a mortgage is an open one, as, for instance, one made by an absolute conveyance, or to secure undefined future advances, the mortgagee is entitled to recover under it only so much as he shows affirmatively to be due. Any doubt and uncertainty, it is said, should operate against the mortgagee and not in his favor.²

3. *Mortgage of Indemnity.*

379. Description of the indemnity. — Very much of what has already been stated, in regard to present and future debts secured by mortgages, is applicable to mortgages made to indemnify a mortgagee against liabilities incurred or to be incurred by him in behalf of the mortgagor. Mortgages of indemnity are perhaps most often given as security for liabilities to be incurred in the future, so that they are to this extent mortgages to secure future advances. Such mortgages generally declare the purpose for which they are given, and set out particularly the liabilities incurred or to be incurred by the mortgagee. But this is not essential. A mortgage given for a definite sum, without specifying the liabilities secured, may be shown by parol evidence to have been given to indemnify the mortgagee against his liability as an indorser or surety for the mortgagor.³ Thus, where a mortgage recited that the mortgagor was indebted to the mortgagee in a certain sum, "being for money advanced," and that the mortgage was made to secure the payment of such debt, the mortgagee was not precluded from showing that the real consideration of the mortgage was the indorsement by him of the mortgagor's note for that sum. "The question of consideration was raised by the defendant's proving, by the mortgagee, that no money was advanced to him upon the mortgage. It thus became proper, if not necessary, to show what the real consideration was, and this was all that was done. The plaintiff had a valid mortgage, as to the mortgagor." He would not be permitted to impeach it by showing that the consideration was not money advanced to him, and shut out evidence of the true consid-

¹ Robinson v. Cromeloin, 15 Mich. 316. rence v. Tucker, 23 How. 14; McKinstor

² Kline v. McGuckin, 25 N. J. Eq. 433. v. Babcock, 26 N. Y. 378; Bank of Utica

³ Shirras v. Caig, 7 Cranch, 34; Law- v. Finch, 3 Barb. (N. Y.) Ch. 293.

eration.¹ "There cannot be a more fair, *bond fide*, and valuable consideration than the drawing or indorsing of notes at a future period, for the benefit and at the request of the mortgagor; and nothing is more reasonable than the providing a sufficient indemnity beforehand."² It is undoubtedly desirable that the true consideration be fully stated, and when this is not done, the instrument may be open to the suspicion that it was made to deceive the mortgagor's creditors; but the true consideration may in all cases be explained.³

380. A general description of the liability is sufficient. A mortgage to indemnify an indorser for liability on notes to be indorsed within two years from the date of the mortgage, to an amount not exceeding \$16,000 at any one time, and a renewal of such notes, was sustained as against a purchaser from the mortgagee.⁴ A mortgage to indemnify one for indorsing "a note of \$2,000, made payable to the order of the grantor, and by him signed and indorsed," is not void for uncertainty. The note intended may be identified by parol evidence.⁵ In like manner, as under a mortgage conditioned to indemnify the mortgagee for indorsements of certain notes payable at two banks specified, parol evidence is admissible to show what notes had been indorsed by the mortgagee and were intended to be secured.⁶ A condition to indemnify the mortgagee against liability as surety for the mortgagor, a certain sum being mentioned, be the debts more or less, covers all debts for which the mortgagee is surety, be they more or less.⁷ A mortgage conditioned to save the mortgagee harmless for indorsing notes for the mortgagor, when thereafter requested, to the amount of \$7,000, and also renewal notes, is not invalid for uncertainty, as against subsequent incumbrances.⁸ Nor is a mortgage invalid which is given to secure an "accommodation indorser and signer on sundry notes, drafts, and bills

¹ Per Marvin J., in *McKinster v. Babcock*, 26 N. Y. 378.

² Per Tilghman, C. J., in *Lyle v. Ducomb*, 5 Binn. (Pa.) 585, 590.

³ *McKinster v. Babcock*, *supra*; *Gardner v. Webber*, 17 Pick. (Mass.) 407, 414; *Commercial Bank v. Cunningham*, 24 Ib. 270.

⁴ *Udey v. Smith*, 24 Conn. 290. The court, Ellsworth, J., said: "Were this an original question, it would be difficult, we think, to sustain the deeds against this

objection; but it is not; and although our early decisions would hold them void, for vagueness, our decisions for the last ten or fifteen years have gone further, and established the law to be liberal enough to sustain mortgages quite as indefinite and vague as the present."

⁵ *Goddard v. Sawyer*, 9 Allen (Mass.), 78.

⁶ *Benton v. Sumner*, 57 N. H. 117.

⁷ *Orr v. Hancock*, 1 Root (Conn.), 265.

⁸ *Ketchum v. Jauncey*, 23 Conn. 123.

of exchange, now maturing in sundry banks, and in the hands of sundry individuals, to the amount of \$50,000, a particular description of which we are not able to give, or in whose hands they are." ¹ A recital in a mortgage that the mortgagee had indorsed two bills of exchange, when in fact he had indorsed only one, and had paid the other for the honor of the drawer, does not invalidate the security.² A mortgage for a definite sum, but expressed to be "given to secure whatever indebtedness may at any time exist from the mortgagor to the mortgagee," does not restrict the indebtedness secured to such debts as may be contracted directly from the mortgagor to the mortgagee, but includes also any obligations the mortgagor may incur by indorsing the notes of another party. The terms of the mortgage are broad enough to cover any kind of indebtedness.³

A mortgage made to secure indorsers upon a note contemplated to be discounted at a particular bank, and so expressed in the deed, is valid, although the note be discounted in a bank other than that named, and is subsequently transferred to a third bank. A subsequent incumbrancer cannot invalidate the mortgage for this reason, unless he can show that he was misled by this description, and advanced money upon the land, or acquired an interest in it after inquiry, and in the confidence that no such lien existed.⁴

381. All limitations of the security must be observed. But if the sum for which the mortgage of indemnity is given be limited, the security cannot be extended beyond that amount. But on the other hand a mortgage conditioned to be void upon the payment of a certain sum upon a note of another for a much larger amount does not entitle the mortgagor to the benefit of payments upon the note by the promisor.⁵ In order to create a liability upon a mortgage made to guarantee a contemplated loan to another, the loan must correspond with the recital of it in the mortgage.⁶

A mortgage made to secure one from all liability, which he may incur by reason of his becoming surety or indorser on the notes of the mortgagor, does not secure notes given to the mort-

¹ *Lewis v. De Forest*, 20 Conn. 427.

⁵ *Popple v. Day*, 123 Mass. 520.

² *Fetter v. Cirode*, 4 B. Mon. (Ky.) 482.

⁶ *Thomas v. Olney*, 16 Ill. 53; and see *Ryan v. Shawneetown*, 14 Ill. 20; *Griffiths, re*, 1 Lowell, 431; *Townsend v. Empire Stone Dressing Co.* 6 Duer (N. Y.), 208.

³ *First Nat. Bank of Paterson v. Byard*, 26 N. J. Eq. 255.

⁴ *Patterson v. Johnston*, 7 Ohio, 225.

gagee for money loaned by him, and as evidence of such loan ;¹ and a mortgage conditioned for the payment of all sums of money owing by the mortgagor to the mortgagee as maker or indorser of any notes, bills of exchange, bonds, checks, or securities of any kind given by him, does not secure a debt not evidenced by an instrument in writing.²

382. A continuing security.— A mortgage given to indemnify an indorser or surety on a note is a continuing security for all renewals of such note until it is finally paid.³ So long as the liability continues, the security continues also.⁴ Although made for a definite sum to a bank to secure the liabilities of a firm for the payment of certain notes, the bank stipulating to discharge the mortgage when the mortgagors should cease to be under any liabilities to the bank, it is a valid security for new notes given to the bank in renewal of the original notes, and subsequent purchasers cannot object to it because the agreement of the bank was not recorded, or that the new notes were made or indorsed by a new firm, formed by taking in another partner.⁵ Under a mortgage given to secure the maker of accommodation notes and renewals of them from time to time, it is not necessary, in order to constitute the new notes renewals, that they should be given for the same amounts, and at the same periods as the original notes, or that each should be applied to discharge its immediate predecessor.⁶

A mortgage to two persons, who were in fact copartners though not so described in the mortgage, intended "as a continuing security and indemnity" for indorsements in any form incurred and to be incurred for the mortgagors, includes not merely such liabilities as were incurred by the mortgagees jointly as copartners but such as were incurred by either of them, separately and individually.⁷

An assignment of a mortgage of indemnity carries only the right to recover the amount for which the mortgagee could then

¹ *Clark v. Oman*, 15 Gray (Mass.), 521.

² *Walker v. Paine*, 31 Barb. (N. Y.) 213; and see *Lauderdale v. Hallock*, 15 Miss. (7 S. & M.) 622.

³ *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164; *Brinckerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65; *Babcock v. Morse*, 19 Barb. (N. Y.) 140.

⁴ *Hawkins v. May*, 12 Ala. 673; *Mayer v. Grottendick*, 68 Ind. 1, quoting text

⁵ *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270. The mortgage may properly provide in terms that it shall be a continuing security. *Fassett v. Smith*, 23 N. Y. 252.

⁶ *Gault v. McGrath*, 32 Pa. St. 392.

⁷ *National Bank of Newburgh v. Bigler*, 83 N. Y. 51.

enforce it. The assignment is a limitation of the security, to the amount then actually paid; and a reassignment of the mortgage does not restore the security for more than the amount for which it was a security before the assignment.¹

A mortgage to indemnify a surety upon a guardian's bond applies to a renewal of the bond.²

383. A mortgage of indemnity to a surety is a lien from the time of its execution and delivery, and not merely from the time when the mortgagee pays the debt on which he is surety;³ and therefore it takes precedence of a conveyance made by the mortgagor, or of a judgment rendered against him, after the execution of the mortgage and before the mortgagee has paid the debt so as to become entitled to enforce the security.⁴ It is sometimes said that a mortgage given to secure one who is expected to make, indorse, or accept negotiable paper for the accommodation of another, is a lien from the time such liability is incurred;⁵ but whenever there is a legal obligation to incur the liability, the mortgage is a lien from the time of its delivery.⁶ When there is no obligation to incur such future liabilities, the mortgage constitutes a lien from the time the liability is incurred, and is preferable to a judgment rendered afterwards,⁷ but not to incumbrances made before advances, of which the mortgagee had notice at the time of the advances.

An executor gave to his sureties a mortgage to indemnify them against "all loss, cost, damage, and expense which they could or might be put to by reason of their being sureties on his bond." The executor filed his account showing a certain balance in his hands. The court approved the account and ordered the fund to be distributed. The executor was at this time insolvent, and one of the sureties advanced the money to pay the legacies. These payments were made before suit was brought, and before any demand was made upon the sureties by the legatees. It was held

¹ O'Hara v. Baum, 88 Pa. St. 114.

² Bobbitt v. Flowers, 1 Swan (Tenn.), 511.

³ Krutsinger v. Brown, 72 Ind. 466. This case further holds that of two indemnifying mortgages, that which is first executed and duly recorded is the prior lien.

⁴ Watson v. Dickens, 20 Miss. (12 S. & M.) 608; Burdett v. Clay, 8 B. Mon. (Ky.) 287.

⁵ Choteau v. Thompson, 2 Ohio St. 114; Bank of Montgomery County's Appeal, 36 Pa. St. 170; Bank of Commerce Appeal, 44 Ib. 423.

⁶ Taylor v. Cornelius, 60 Pa. St. 187; Lyle v. Ducomb, 5 Binn. (Pa.) 585.

⁷ Kramer v. Farmers' & Mechanics' Bank, 15 Ohio, 253; Hartley v. Kirilin, 45 Pa. St. 49.

that the surety was entitled to all the benefit of the mortgage as against an intervening judgment creditor who obtained judgment shortly after the mortgage was executed.¹

384. Parol evidence is admissible to show the true character of a mortgage, and for what purpose and what consideration it was given. Although it be for a definite sum, and secures the payment of notes for definite amounts, it may be shown that the mortgage was simply one of indemnity.² When the object is simply to indemnify the mortgagee for a liability he has incurred or may incur, the amount of the mortgage, or of the mortgage note, serves merely to limit the extent of the security. Upon the foreclosure of such a mortgage, the amount for which judgment is to be rendered is the amount the mortgagee has been compelled to pay under the liability for which he was secured, with interest from the date of the payment. The amount and date of the mortgage note are wholly disregarded in ascertaining this sum.³

A distinction is taken between a mortgage conditioned to secure against a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. Where the indemnity provided is against a "charge" or "fixed legal liability," the obligee is to be saved from the thing specified, and the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform; while, on the other hand, where the covenant is for indemnity only, and against resultant damages, these must be actually suffered before an action can be maintained.⁴

A mortgage given as a continuing security and indemnity for and against all liabilities the mortgagees had incurred or might thereafter incur for the mortgagor as indorsers, is not a mortgage of indemnity merely, but one of security as well, and therefore it is not essential to a recovery to show that damages have been sustained; but the right of the mortgagees to resort to the security arises when their liability is fixed.⁵

If a mortgage given to secure the mortgagee from loss, by reason of his having become a surety upon a note executed by one of the mortgagors, stipulates that the mortgagors "will pay the

¹ *Smith v. Harry*, 91 Pa. St. 119.

² *Price v. Gover*, 40 Md. 102; *Jones v. Guaranty & Indemnity Co.* 101 U. S. 622; *Mayer v. Grottendick*, 68 Ind. 1, quoting text.

³ *Athol Savings Bank v. Pomroy*, 115 Mass. 573; and see § 64.

⁴ *Gilbert v. Wiman*, 1 N. Y. 550; as stated by *Finch, J.*, in *National Bank of Newburgh v. Bigler*, 83 N. Y. 51, 61.

⁵ *Supra*.

sum of money above secured," a cause of action accrues to the mortgagee upon failure of the maker of the note to pay the note when it becomes due, without the mortgagee's first paying the note.¹

385. The principal creditor is not entitled to the benefit of a mortgage given to a surety until the liability of the latter is fixed.² If the indorser is discharged by the laches of the creditor, he cannot claim the benefit of the mortgage.³ The condition of such a mortgage is broken when the mortgagor fails to pay the debt at the time stipulated, so that the mortgagee is exposed to a suit.⁴ He may then at once proceed to foreclose the mortgage without notice or further action on his part.⁵ When the condition is to indemnify the mortgagee against the support of a third person, it is a sufficient breach that the mortgagee is compelled to pay for such support for a part of the time.⁶

If the mortgage to the surety include a debt due to himself, as well as the debt for which he is liable as surety, as between himself and the principal creditor, the latter is entitled to be first paid out of the proceeds of the mortgage, on the ground that such mortgagee is a *quasi* trustee for the creditor in respect of the indemnity thus obtained.⁷

386. Under what circumstances one who has taken a mortgage solely for his own indemnity may release the security does not seem to be determined. As against the principal creditor, who is entitled to the benefit of the securities held by the surety, it would seem at any rate that after a default on the part of the principal debtor, and the liability of the surety had thus become fixed, he could not release the securities held by him. As against his own creditors, after he has become insolvent, it would also seem that he could not release a mortgage or other security held by him as indemnity.⁸ If the mortgage held by him be anything more than one of indemnity, if it in terms secures the original debt, he has no right to discharge it.

An indorser of certain notes took from the maker of them a mortgage as security from any loss the indorser might sustain

¹ Gunel v. Cue, 72 Ind. 34; Thomas v. Allen, 1 Hill (N. Y.), 145; Gilbert v. Wiman, 1 N. Y. 550; Wilson v. Stilwell, 9 Ohio St. 467; Loosmore v. Radford, 9 M. & W. 657.

² Tilford v. James, 7 B. Mon. (Ky.) 336.

³ Tilford v. James, *supra*.

⁴ Shaw v. Loud, 12 Mass. 447.

⁵ Butler v. Ladue, 12 Mich. 173.

⁶ Whitton v. Whitton, 38 N. H. 127.

⁷ Ten Eyck v. Holmes, 3 Sandf. (N. Y.) Ch. 428.

⁸ Woodville v. Reed, 26 Md. 179, 181.

from the non-payment of the notes. The proviso was that the mortgagor should pay the notes at their maturity "to the holders of them," or to the indorser, should the latter be compelled to take them up; the mortgagee subsequently released the mortgage before the notes were paid, and the mortgagor conveyed the premises to a purchaser. The holder of the mortgage notes then filed a bill to foreclose the mortgage; and it was held that the mortgage was a security for the payment of the notes, as well as an indemnity to the indorser; that it enured to the benefit of any one in whose hands the notes might be, provided he is a *bond fide* holder of them; and that consequently the mortgagee had no power to release the mortgage, so as to deprive the holder of the notes of the benefit of this security.¹

387. Not after liability is fixed. — A mortgage given to indemnify a surety or indorser does not, in the first instance, attach to the debt; and whatever equity may arise in favor of the creditor with regard to the security arises afterwards, and in consequence of the insolvency of the parties primarily holders for the debt. Until this equity arises, the surety has a right in equity as well as at law to release the security. Even after such insolvency the mortgagee may surrender the security, if he does it in good faith, and before any claim is made upon him for it. The application of it for the benefit of third persons can only be accomplished by the interposition of a court of equity, and in case the mortgagee still retains the security.²

But after the principal debtor has become insolvent, the surety cannot make a valid agreement with the holder, or any party interested in one of the notes on which he is indemnified by the mortgage, that the security shall be first applied to such note; the holders of all such notes are entitled in equity to share in the property in proportion to their respective claims.³

When a mortgage is given to indemnify an indorser, the creditor has an equitable claim to the security, and after the liability is fixed is entitled to have the mortgage assigned to him. This is the rule not only where the condition is that the mortgagor shall pay the debt, but also where it merely stipulates that he shall indemnify the surety.⁴ Thus, a mortgage by the principal

¹ *Boyd v. Parker*, 43 Md. 182.

² *Lewis v. De Forest*, 20 Conn. 427.

³ *Thrall v. Spencer*, 16 Conn. 139; ⁴ *New Bedford Inst. for Savings v. Homer v. Savings Bank*, 7 Conn. 478; *Fairhaven Bank*, 9 Allen, 175; *Aldrich v. Jones v. Quinnipiack Bank*, 29 Conn. 25; *Martin*, 4 R. I. 520; *Saylors v. Saylors*, 3 Post v. Tradesmen's Bank, 28 Conn. 420. *Heisk. (Tenn.)* 525; *Riddle v. Bowman*,

maker of a promissory note to his surety, conditioned that the principal will pay the note and save the surety harmless, creates a trust and an equitable lien for the holder of the note; and even after the surety's liability to the holder of the note is barred by the statute of limitations, he holds the property subject to such trust and lien.¹ If he has foreclosed the mortgage, and obtained an absolute title to the property, the same trust still attaches to it.² This equitable lien binds the property, after a transfer of it by the mortgagee to one who has notice of the trust. The mortgage is treated as a mere security for the debt; and when the debt is assigned by the mortgagee, it carries with it in equity, as an incident, a right to have the estate appropriated for the payment of the debt in the hands of the assignee. To carry out and enforce this equity, the mortgagee is regarded as the trustee of those to whom he has assigned the debt secured by the mortgage, and can be compelled to appropriate it for their benefit.³

4. *Mortgages for Support.*

388. **Whether strictly mortgages.** — It has sometimes been questioned whether a deed conditioned for the support and maintenance of a person, or for the performance of any other duty the damages for a breach of which are unliquidated, can be regarded as strictly a mortgage. Early definitions of mortgages are found by which no conditional conveyances are mortgages except such as are made for the security of a loan of money; others include all conveyances made as security for any debt; while the later doctrine generally is, that a conveyance conditioned for the performance of any contract is a mortgage.⁴ But in quite recent cases it is said that many contracts, the performance of which may be secured by conveyances of land, have such peculiarities that the rules of law relating to mortgages can have but a very partial if any application to them.⁵ In New Hampshire, although it is provided by statute⁶ that "every conveyance of lands made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a

27 N. H. 236; *Phillips v. Thompson*, 2 Johns. (N. Y.) Ch. 418; *Thornton v. Nat. Exchange Bank*, 71 Mo. 221.

¹ *Eastman v. Foster*, 8 Met. (Mass.) 19.

² *Eastman v. Foster*, *supra*.

³ *Rice v. Dewey*, 13 Gray (Mass.), 47.

⁴ Per Bell, C. J., in *Bethlehem v. Annis*, 40 N. H. 34.

⁵ *Bethlehem v. Annis*, *supra*, per Bell, C. J.

⁶ G. S. 1867, 253, c. 122, § 1; G. L. 1878, c. 136, § 1.

mortgage," it is held that a deed conditioned for support, and implying the personal services of the mortgagor, is not a mortgage. Neither the grantor nor the grantee, under such a deed, can assign his interest. The contract is for services to be rendered by the one in person to the other in person. The former, having assumed a personal trust, cannot substitute another person in his place to fulfil it.¹ Upon his death, a sale of the estate by his administrator under license of court, subject to this duty, passes no title, and the purchaser cannot maintain a bill to redeem.² And on the other hand, it is held that the person who is to receive the personal service cannot assign the obligation and security to another, so as to enable such other person to enforce it, unless, perhaps, where there has been an actual breach and an entry for condition broken before the assignment.³

In Pennsylvania, upon somewhat different grounds, it is said that when a father conveys land to his son, and takes a reconveyance, conditioned for the faithful performance of covenants to support, although such reconveyance may be termed a mortgage, it is something more than a mortgage; for in an ordinary mortgage, when the object of security is accomplished, the conveyance becomes void; but if there be a breach of the condition to support, and the father in consequence takes possession, the son cannot claim upon his father's death that the title should vest in him, notwithstanding he has failed to perform his covenants. That would be no security that the son would perform his covenants, but an inducement for him to break them. It would enable him to throw off all the trouble and responsibility of his contract, and simply by waiting a few years without doing anything, get the property for nothing. Nothing can give effectual security for the performance of such covenants but the right to revest the entire estate upon a breach. The son having broken his cov-

¹ *Flanders v. Lamphear*, 9 N. H. 201. See, however, *Austin v. Austin*, 9 Vt. 420; *Bryant v. Erskine*, 55 Me. 153.

² *Eastman v. Bachelder*, 36 N. H. 141.

³ *Bryant v. Erskine*, 55 Me. 153; *Bethlehem v. Annis*, 40 N. H. 34. In this case Chief Justice Bell said: "Wherever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to

a limited extent, and the party, if relieved by a court of equity from the forfeiture resulting from the non-performance of the condition, will not be relieved as in cases of a mortgage. It is not, however, intended to say that the same principle of justice, which has led courts of equity to establish the system of relief from forfeitures in the case of mortgages, will not entitle a party to analogous relief in cases where the design of the parties is to make a conveyance by way of security."

enants to support his father during life, has no possible equity on his death to demand a reconveyance. A recovery in ejectment by the father after breach as effectually revests the title in him as would a reëntry for condition broken.¹

But the courts generally treat as mortgages conveyances conditioned for the support and maintenance of the mortgagees. They are generally in such terms that the court can by an award of damages compensate the mortgagees for a non-performance of the personal services ;² but it rests in the sound discretion of the court whether a forfeiture shall be relieved in this way.³

389. Mortgagor's right of possession implied. — Generally, when land has been conveyed to the mortgagor by the mortgagee, who has taken a mortgage of the same, conditioned for his support, there is a necessary implication, nothing appearing to the contrary, that the mortgagee is not to enter until there is a breach of the condition.⁴ The possession of the property is generally essential to the mortgagor to enable him to perform the condition. The mortgagee cannot then maintain an action for possession until there has been a breach of condition.

If a mortgage for the support of a person for life be followed by a lease of the same premises for life given by the mortgagor to the mortgagee, the lease is regarded as merely giving the mortgagee the possession and use of the premises. The lease does not extinguish the mortgage, but is merely ancillary to it, and its enjoyment may *pro tanto* operate as a satisfaction of the covenants of the bond or agreement for support.⁵

390. Alternative condition. — When a mortgage is conditioned to pay a certain sum *or* to support the mortgagee, the mortgagor has his election which alternative he will take, and if he elect to furnish support, he is entitled to possession of the premises in order to be enabled to comply with the condition

¹ *Soper v. Guernsey*, 71 Pa. St. 219. The defeasance in this case was : " Provided always, nevertheless, that if the said party of the first part shall and does well, truly, and faithfully perform all and singular the aforesaid covenants, promises, and agreements unto the said party of the second part, according to the true intent and meaning thereof, without fraud or delay, then this indenture and the estate hereby granted shall become void."

² 2 Greenl. Cruise, 80, n. ; *Hoyt v. Bradley*, 27 Me. 242 ; *Borst v. Crommie*,

19 Hun (N. Y.), 209 ; *Austin v. Austin*, 9 Vt. 420. Chancellor Phelps, in this case, said : " There is, certainly, no difficulty in making compensation for past maintenance, any more than in any case of a contract to perform services."

³ *Henry v. Tupper*, 29 Vt. 358.

⁴ §§ 668, 703 ; *Flanders v. Lamphear*, 9 N. H. 201 ; *Rhoadas v. Parker*, 10 N. H. 83 ; *Dearborn v. Dearborn*, 9 N. H. 117 ; *Brown v. Leach*, 35 Me. 39, 41 ; *Bryant v. Erskine*, 55 Me. 153. See § 80.

⁵ *Powers v. Patten*, 71 Me. 583.

he has chosen to perform. But having once made the election he cannot revoke it. His election is also conclusive upon the mortgagee, who cannot have the election in the beginning, and much less can he have part performance of one of the alternatives, and then claim the entire performance of the other.¹ The election having been made, the mortgage becomes security for the performance of the condition chosen as effectually as if that alone had been set forth.² But a mortgage to secure the payment of \$500 in five years, "to be paid in furnishing the mortgagee," during that period, "a good and sufficient home and support," does not give the mortgagor his election to pay in money.³

391. Where the support is to be furnished.—When no place is stipulated where the mortgagee is to receive support, he has a right to be supported wherever he may choose to live, provided he does not create any needless expense to the mortgagor.⁴ When it is provided that the support is to be furnished on the granted premises, but that the mortgagor, with his family, may also reside there, the latter has no right to insist that the mortgagee shall become a part of his family or receive support at his table, and in the apartments occupied by him. A refusal to furnish such support in a separate room is a breach of the condition.⁵

The condition of such a mortgage is broken by the mortgagor's declining to pay for the board of the mortgagee at a suitable place, although he make no special demand upon the mortgagor for such support.⁶

A mortgage conditioned to provide a home in the house on the premises obliges the mortgagor, notwithstanding his removal from the premises, and the house becoming, by natural decay and without his fault, much dilapidated and not worth repairing, to provide a home there, or to furnish an equivalent elsewhere, but

¹ *Bryant v. Erskine*, 55 Me. 153. "It is laid down as a general rule that, in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the decision. As if a man grants a rent of 20s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent, by payment of one or the delivery of the other." 3 Bac. Abr. Election, B, p. 309.

² See *Furbish v. Sears*, 2 Cliff. 454.

³ *Hawkins v. Clermont*, 15 Mich. 511; and see *Evans v. Norris*, 6 Mich. 369.

⁴ *Wilder v. Whittemore*, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. (Mass.) 398; *Flanders v. Lamphear*, 9 N. H. 201; *Rowell v. Jewett*, 69 Me. 293; *Borst v. Crommie*, 19 Hun (N. Y.), 209.

⁵ *Hubbard v. Hubbard*, 12 Allen (Mass.), 586.

⁶ *Pettee v. Case*, 2 Allen (Mass.), 546.

does not oblige him to supply food, clothing, or fuel. The fact that the mortgagor actually furnished such supplies for some time after making the mortgage does not affect this construction.¹

It is not sufficient proof of a breach of contract to support a person during his life, to show that he left the house of the obligor and resided elsewhere for several years, but without at any time requesting him to fulfil his agreement, or in any way manifesting to him an intention or desire to hold him to the performance of the obligation.²

Where a mortgage by a son to his mother was conditioned "to provide a horse for said Margery to ride to meeting and elsewhere, when necessary; find her firewood for one fire, to be drawn and cut at the door, fit for use; give her a good cow, and keep said cow for her during the natural life of her the said Margery," it was held that the destruction of the house in which the mother lived with her son did not exempt him from the performance of the condition, and that he was bound to furnish the wood at such place as she should make her home, within a reasonable and convenient distance; that if the mortgagee was obliged to sell the cow in consequence of its not being properly kept, it was not necessary, in order to charge him with the cost of keeping a cow for the time subsequent to the sale, that the mortgagee should purchase a cow and tender her to the mortgagor to be kept.³

392. Who may perform the condition. — As already stated, a mortgage for support is in its nature a contract for personal services, and especially when by its terms the condition is to be performed by the mortgagor, his executors, and administrators, the duty cannot be transferred to a third person. Upon the death of the mortgagor, the condition must be kept by his heirs, executors, or administrators, and the mortgaged property subject to this duty cannot be disposed of by the administrator for the payment of the mortgagor's debts.⁴

393. Foreclosure. — A mortgage for the support of the grantee and his wife during their lives may be foreclosed by the administrator of the grantee, for a breach of condition occurring

¹ *Gibson v. Taylor*, 6 Gray (Mass.), 310.

² *Fiske v. Fiske*, 20 Pick. (Mass.) 499.

³ *Jenkins v. Stetson*, 9 Allen (Mass.), 128; *Thayer v. Richards*, 19 Pick. (Mass.) 398; *Rhoades v. Parker*, 10 N. H. 83.

⁴ *Eastman v. Batchelder*, 36 N. H. 141; *Bethlehem v. Annis*, 40 N. H. 34; *Bryant v. Erskine*, 55 Me. 153.

both before and after the grantee's death, although his widow does not join in the suit.¹

But where a mortgage was conditioned to support the mortgagee during her lifetime, and there was no evidence of a breach of the condition, or of any demand for support other than what was furnished, it was held that the administrator of the mortgagee could not foreclose the mortgage for the benefit of persons who had boarded the mortgagee at the mortgagor's request. The mortgage was regarded as for the benefit of the mortgagee, and not for the benefit of those who might furnish her with support. Whatever claim they severally had for boarding and taking care of her at the mortgagor's request was against him personally, and not against her or her estate.²

Where a mortgage from a son to his parents, for their support, provides also for the use of a horse and buggy when they, or either of them, may desire it, there is a breach of the condition, upon a failure to furnish it on a reasonable demand by either of them alone, and either of them may have a separate action for damages. The provision is not joint but several. The damages allowed should cover the actual damage sustained. No decree can be made for future violations of this provision. It is impossible to determine in advance what damages may result from a failure to perform the condition.³

An instrument under seal but not acknowledged, in which the maker agrees to support his father and mother during their natural lives, and as security for the fulfilment of the agreement conveys and grants to them, "each and severally, a life lien or dower, or lien of maintenance for life," in real estate, is a mortgage; and upon a breach of the agreement, an action for possession of the premises may be sustained by the father alone.⁴

If the mortgagor give a bond in a fixed sum conditioned for the maintenance and support of the mortgagee, such sum will be regarded as a penalty, and the mortgage cannot be treated as one to secure the payment of that sum absolutely unless there be a stipulation that this sum shall be regarded as liquidated damages for any default.⁵

Instead of a judgment of foreclosure and sale, in some states a

¹ *Marsh v. Austin*, 1 Allen (Mass.), 235.

² *Daniels v. Eisenlord*, 10 Mich. 454.

³ *Tucker v. Tucker*, 24 Mich. 426; S. C. 35 Mich. 365.

⁴ *Gilson v. Gilson*, 2 Allen (Mass.), 115; and see *Lanfair v. Lanfair*, 18 Pick. (Mass.) 299. The judgment may be in the nature of a strict foreclosure. § 1556.

⁵ *Bresnahan v. Bresnahan*, 46 Wis. 385.

judgment of strict foreclosure, or for the rescinding of the conveyance, will be entered.¹

394. Agreement for arbitration. — Under a mortgage to secure the performance of a bond or contract conditioned to support the mortgagee, a stipulation, "that should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted" to three persons named, "and their decision shall be final," does not prevent an action for breach of condition by the mortgagee. This comes within the general principle, that an agreement for arbitration shall not deprive one of his legal remedies.²

395. Such a mortgage may be redeemed after breach.³ A court of equity may grant relief from the forfeiture of a condition for the maintenance of the mortgagee when the forfeiture has been accidental or unintentional, and not attended with irreparable injury. But the granting of relief in such a case rests in the sound discretion of the court.⁴

¹ *Bresnahan v. Bresnahan*, 46 Wis. 385; *Bogie v. Bogie*, 41 Wis. 209.

² *Hill v. More*, 40 Me. 515.

³ *Bryant v. Erskine*, 55 Maine, 153; *Bethlehem v. Annis*, 40 N. H. 34, 43; *Rowell v. Jewett*, 69 Me. 293.

⁴ *Henry v. Tupper*, 29 Vt. 358, 375. *Redfield, C. J.*, said: "We must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, or accident, or mistake, we certainly should not grant relief when the omission was wilful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform. . . . The case might occur where the refusal to afford daily support would be wanton or wicked; indeed, where it might proceed from murderous intentions even; and it is even supposable that the treatment of those who were the objects of the

services should be such as to subject the grantor to indictment for manslaughter, or murder even, and possibly to ignominious punishment, and to death. To afford relief in such a case, for the benefit of the heirs, would be to make the court almost partakers in the offence. And the case, upon the other hand, is entirely supposable, and of not infrequent occurrence, where, through mere inadvertence, a technical breach may have occurred in the non-performance of some unimportant particular, in kind or degree, where, through perhaps mere difference in construction, or error in judgment, one may have suffered a forfeiture of an estate at law of thousands of dollars in value, where the collateral service was not of a dollar's value, and attended with no serious inconvenience to the grantee. Not to afford relief in such case would be a discredit to the enlightened jurisprudence of the English nation and those American States which have attempted to follow the same model."

See, also, § 388; *Dunklee v. Adams*, 20 Vt. 415, 421; *Soper v. Guernsey*, 71 Pa. St. 219.

CHAPTER X.

INSURANCE.

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| I. Insurable interests of mortgagor and mortgagee, 396-399. | III. Insurance by the mortgagee, 418-421. |
| II. Insurance by the mortgagor for the benefit of the mortgagee, 400-417. | IV. A mortgage is not an alienation, 422-427. |

1. *Insurable Interests of Mortgagor and Mortgages.*

396. An insurance against fire is a contract of indemnity with the assured against any loss he may sustain by the burning of the buildings. He must have some interest in the property insured, as owner, mortgagee, or otherwise, to make the contract effectual. If he never had any interest, or if at the time of the loss he had ceased to have any interest, he cannot claim anything under the contract; for he has suffered no loss. He may upon transferring his interest in the estate at the same time transfer the policy of insurance, and such transfer, being assented to by the underwriter, constitutes a new and original promise to the assignee to indemnify him. "But such undertaking," said Shaw, C. J., "will be binding, not because the policy is in any way incident to the estate or runs with the land, but in consequence of the new contract."¹

397. *Insurable interests.* — The mortgagor may insure the full value of the property, and recover the sum insured, if at the time of the loss, he had the right of redemption;² and it matters not that the mortgagee has taken possession of the premises.³ Neither does it matter that his right in equity has been seized and sold on execution; his insurable interest continues so long as he has the right to redeem from such sale, and he may upon a loss recover the whole amount insured.⁴

¹ *Wilson v. Hill*, 3 Met. (Mass.) 66, 69;
Macomber v. Camb. Mut. F. Ins. Co. 8
Cush. (Mass.) 133; *Murdock v. Chenango*

² *Stephens v. Ill. Mut. Fire Ins. Co.* 43
Ill. 327; *Illinois F. Ins. Co. v. Stanton*,
57 Ill. 354.

Co. Mut. Ins. Co. 2 N. Y. 210.

⁴ *Strong v. Manufacturers' Ins. Co.* 10
Pick. (Mass.) 40.

³ *Insurance Co. v. Stinson*, 103 U. S.

The mortgagee and mortgagor may both insure their separate interests at the same time. Such insurance is not liable to the objection of a double insurance, because to constitute this the two policies must be not only upon the same property, but also for the benefit of the same person, and for the same entire risk.¹

The owner of an equity of redemption obtained a policy of insurance which contained a provision that he should not be entitled to recover any greater proportion of the loss than the amount insured might bear to the whole sum insured on the same property, without reference to the solvency or liability of other insurers. The owner had at the time of the loss another policy on his interest in another company; and the mortgagee had a policy on his interest in a third company. The jury were properly directed to apportion the loss between the companies having insurance upon the mortgagor's interest, without taking into account the value of the interest of the mortgagee insured by him; that is to say, in apportioning the loss, the value of the equity of redemption was taken as a basis, and not the value of the entire property.²

The insurable interest of the holder of the mortgage is measured by the value of his lien, if this does not exceed the value of the property.³ He may recover according to his interest at the time of the loss. It does not matter that the mortgage is not valid at law, so long as it is valid in equity, as in the case of a mortgage by a husband to his wife, made for a just and valuable consideration.⁴

The mortgagee may insure as general owner without disclosing his interest unless this is inquired about, or he may insure his interest as mortgagee.⁵ When an inquiry is made respecting his interest, or when he undertakes to make a disclosure of his interest, his representations must be substantially correct or the policy

¹ *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

² *Tuck v. Hartford F. Ins. Co.* 56 N. H. 326.

³ *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Kernochan v. N. Y. Bowery F. Ins. Co.* 5 Duer (N. Y.), 1; S. C. 17 N. Y. 428; *Tillou v. Kingston Mut. Ins. Co.* 7 Barb. (N. Y.) 570; *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 7 Lans. (N. Y.) 138; S. C. 55 N. Y. 343.

⁴ *Mix v. Andes Ins. Co. of Cincinnati*, 9 Hun (N. Y.), 397.

⁵ *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, per Mr. Justice Walker: "Neither reason, authority, nor the contract of assurance, so far as we can see, required the mortgagee, unless interrogated, to state the nature of his interest in the property."

will be void. But the mere fact of not disclosing his interest will not have that effect.

A mortgagee, who upon assigning the mortgage has indorsed the note, has an insurable interest in the mortgaged property. And that interest is sufficiently described by calling him "mortgagee," though the policy provide that the interest of the assured, whether as owner, trustee, mortgagee, lessee, or otherwise, shall be truly stated.¹

Upon payment of the mortgage debt the mortgagee's insurable interest ceases; and upon part payment his insurable interest is the amount of the debt remaining unpaid.²

398. The mortgagor's interest remains insurable so long as he has a right to redeem the land. It continues after a sale of his equity of redemption on execution until his right to redeem from such sale is barred; and he may recover the insurance notwithstanding the sale.³ What the value of his redeemable interest may be is immaterial; the whole sum insured may be recovered, if this does not exceed the value of the property.⁴ In like manner the mortgagor's insurable interest continues after a foreclosure sale when a right to redeem exists after such a sale, so long as this right exists; and when there is no right of redemption after such sale, it would seem that he retains an insurable interest until the deed is delivered in pursuance of the sale. The purchaser has no right to the possession of the property until he receives the deed, and in the mean time the mortgagor has at least the right to occupy or to collect the rents; and until then, the sale is not complete nor is the right to redeem conclusively barred.⁵ Even after a mortgagor has conveyed his equity of redemption subject to the mortgage, or his grantee has assumed the payment of it, he retains an insurable interest, because he is liable upon the mortgage note to the holder of the mortgage, and is therefore interested in the preservation of the property charged

¹ *Williams v. Roger Williams Ins. Co.* 107 Mass. 377.

² *Sussex Co. Mut. Insurance Co. v. Woodruff*, 2 Dutch. (N. J.) 541.

³ *Strong v. Manufacturers' Ins. Co.* 10 Pick. (Mass.) 40.

⁴ *Strong v. Manufacturers' Ins. Co.* *supra*.

⁵ *Gordon v. Mass. F. & Marine Ins. Co.* 2 Pick. (Mass.) 249; *Buffalo Steam-En-*

gine Works v. Sun Mut. Ins. Co. 17 N. Y. 401, 404. In *McLaren v. Hartford F. Ins. Co.* 5 N. Y. 151, it was held that the mortgagor could not recover for a loss happening after a sale under a decree of foreclosure, and before the delivery of the deed, having then no insurable interest; but this ruling is doubted in *Cheney v. Woodruff*, 45 N. Y. 98; and see *Brown v. Frost, Hoff.* (N. Y.) 41.

with the payment of it.¹ And even after an absolute conveyance, intended, however, as a security merely and therefore in equity a mortgage, the mortgagor retains an insurable interest.²

399. When application should state incumbrance. — The existence of a mortgage upon a building, for the insurance of which application is made, is a material fact, if inquired about, and any misrepresentation in regard to the existence of the incumbrance or the amount of it will render void the policy.³ Although the original amount of the mortgage be correctly stated, a failure to disclose the existence of accumulated interest to a large amount has been held to invalidate the policy.⁴ But if the principal of the mortgage be correctly stated, the omission to include interest upon it then accruing, but not then due, does not make the representation of the amount of the incumbrance untrue nor render the policy void.⁵ The failure of an applicant for insurance to disclose the existence of a mortgage which has been paid, or one which is invalid by reason of its having been obtained by fraud, does not render the policy void.⁶

Knowledge on the part of the insurer of the existence of a mortgage may be inferred from the circumstances of the case, though not actually disclosed by the insured; thus where the insurers of property upon which there was at the time an undisclosed mortgage, afterwards insured the interest of the mortgagee and later still renewed the first policy, the circumstances warranted a finding that the insurers knew of the mortgage when

¹ *Waring v. Loder*, 53 N. Y. 581; *Co. 2 Allen (Mass.)*, 569; *Bowditch Mut. F. Ins. Co. v. Winslow*, 8 Gray (Mass.), 163.

² *Hodges v. Tennessee Marine & F. Ins. Co.* 8 N. Y. 416; *Walsh v. Phila. F. Asso.* 127 Mass. 383.

³ *Davenport v. N. E. Mut. F. Ins. Co.* 6 Cush. (Mass.) 340; *Van Buren v. St. Joseph County Village F. Ins. Co.* 28 Mich. 398. Stating the mortgage to be about \$3,000, when it was in fact \$4,000, has that effect. *Hayward v. N. E. Mut. F. Ins. Co.* 10 Cush. (Mass.) 444; and to like effect, *Brown v. People's Mut. Ins. Co.* 11 Ib. 280; void also when subject to a preëxisting mortgage not recorded; *Packard v. Agawam Mut. F. Ins. Co.* 2 Gray (Mass.), 334; misrepresentation as to the existence of mortgage; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *S. C.* 8 Ins. L. J. 271; *Draper v. Charter Oak F. Ins.*

Co. 2 Allen (Mass.), 569; *Bowditch Mut. F. Ins. Co. v. Winslow*, 8 Gray (Mass.), 38; *S. C.* 3 Ib. 415; *Falis v. Conway Mut. F. Ins. Co.* 7 Allen (Mass.), 46; *Towne v. Fitchburg Mut. F. Ins. Co.* 7 Ib. 51; *Murphy v. People's Eq. Mut. F. Ins. Co.* 7 Ib. 239; *Smith v. Columbia Ins. Co.* 17 Pa. St. 253; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410; *Byers v. Farmers' Ins. Co.* 35 Ohio St. 606. Whether a deed of trust is compatible with an entire, unconditional, and sole ownership of the property by the assured, see *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. (Va.) 389.

⁴ *Jacobs v. Eagle Mut. F. Ins. Co.* 7 Allen (Mass.), 132.

⁵ *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410.

⁶ *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302.

they renewed the policy to the mortgagor.¹ Knowledge on the part of an agent of the insurers of an incumbrance will be imputed to the insurers themselves.² Knowledge of the existence of an incumbrance on the part of the agent authorized to solicit the insurance will bind the company, although the application filled up by him stated that there was no incumbrance.³

Although the policy be taken upon the interest of a mortgagee, a concealment of the existence of prior mortgages held by him, when their disclosure was called for, avoids the policy.⁴

When incumbrances are not made material by an inquiry in relation to them, the applicant is not bound to disclose them. It is only necessary that he should have an insurable interest.⁵

2. Insurance by the Mortgagor for the Benefit of the Mortgagee.

400. When the mortgage provides that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and in fulfilment of this covenant he takes out a policy of insurance in his own name, which is not assigned to the mortgagee or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy;⁶ and if his mortgage is duly recorded, the covenant for insurance is regarded by some authorities as running with the land, and as giving notice of the right to others, so that no subsequent assignment of the policy would affect his rights.⁷ It is immaterial in this respect whether the policy existed at the time of the mortgage, or was afterwards taken out by the mortgagor.⁸ The mortgagee in such case stands in the position of an assignee of a chose in action; he must enforce his rights in the name of the mortgagor, but his interest is sufficient to enable him to hold the

¹ State Ins. Co. of Mo. v. Todd, 83 Pa. St. 272.

² Holmes v. Drew, 16 Hun (N. Y.), 491.

³ Boetcher v. Hawkeye Ins. Co. 47 Iowa, 253; S. C. 7 Am. Law Rec. 383.

⁴ Smith v. Columbia Ins. Co. 17 Pa. St. 253.

⁵ Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

⁶ Vernon v. Smith, 5 Barn. & Ald. 1; *In re Sands Ale Brewing Co.* 3 Biss. 175; Carter v. Rockett, 8 Paige (N. Y.), 437; Cromwell v. Brooklyn F. Ins. Co. 44 N.

Y. 42, 47, per Earl, C.; Thomas v. Vonkapff, 6 Gill & J. (Md.) 372; Norwich F. Ins. Co. v. Boomer, 52 Ill. 442; Providence County Bank v. Benson, 24 Pick. (Mass.) 204; Dunlop v. Avery, 24 Hun (N. Y.), 509.

⁷ *In re Sands Ale Brewing Co. supra.*

⁸ Nichols v. Baxter, 5 R. I. 491. The policy in this case was in existence when the mortgage was made and conformed in amount to the required insurance; and the court found as a fact that the intention of the parties was that this particular policy should be assigned to the mortgagee.

proceeds against an attaching creditor or any subsequent assignee. But these cases which support the claim of the mortgagee to insurance obtained by the mortgagor in his own name are regarded as resting upon special facts which justify the inference that the insurance in question was obtained by the mortgagor with the intent to perform his agreement to insure for the benefit of the mortgagee, or that the agreement had reference to the insurance already obtained. Accordingly where there was no ground for such inference, and the insurance company paid the amount of the loss to the mortgagor, the Supreme Court of Massachusetts held that the mortgagee had no equitable lien upon the policy and could not recover in the name of the mortgagor.¹

When the mortgagor, in a mortgage containing such a covenant, has procured a policy in his own name, and after a loss has delivered the policy to a third person in trust, to collect the insurance money, and pay from it the mortgage debt, the mortgagee thereupon has an equitable lien upon the policy which he may enforce, although the mortgagor afterwards obtains possession of the policy and fraudulently seeks to avail himself of it for his sole benefit.² A mortgagee is entitled to the benefit of a policy upon the mortgaged property under a covenant for insurance where the mortgagor represented that the property was covered by this particular policy which he agreed to transfer as collateral security, but in fact transferred a policy upon a building which had been removed from the mortgaged premises, and retained the policy he agreed to assign. It was fraud in him to assign a worthless policy and retain the policy expressly stipulated for the mortgagee's security.³

When a lessee has effected insurance under a provision in his lease that a policy shall be taken by him, and the money payable under it shall be applied in restoring the premises, the benefit of the insurance passes by a mortgage of his term without special mention of it.⁴

Where the agreement to keep insurance for the benefit of the mortgagee was merely verbal, but the mortgagor had acted upon it by obtaining such insurance, and his grantee having knowledge of the agreement subsequently surrendered this policy, and

¹ *Stearns v. Quincy Mut. F. Ins. Co.* 124 Mass. 61.

² *Doughty v. Van Horn*, 29 N. J. Eq. 90.

³ *Hazard v. Draper*, 7 Allen (Mass.), 267; and see *Providence County Bank v. Benson*, 24 Pick. (Mass.) 204.

⁴ *Garden v. Ingram*, 23 L. J. Ch. 478.

took another, which was not payable to the mortgagee, it was held that he was nevertheless entitled in equity to have the insurance money applied in payment of the mortgage debt.¹

401. But if there is no covenant or agreement in the mortgage that the premises shall be insured for the benefit of the mortgagee, the mere fact that his mortgage covers the property insured, and the insured is personally liable for the debt, gives the mortgagee no corresponding claim upon the policy or the proceeds of it.² His claim is then no better than that of any creditor of the mortgagor. The policy is strictly a personal contract. It does not attach to the mortgage or to the realty. It has even been held that a mere covenant by the mortgagor to effect insurance, without any stipulation that it is for the benefit of the mortgagee, or that the loss shall be paid to him, does not imply that the mortgagor shall apply the insurance money either in discharge of the mortgage debt or in restoration of the property.³ A covenant to effect insurance is not without meaning, or without advantage to the mortgagee, although it be not either expressly or impliedly made for his benefit.

402. The mortgagee may have an equitable lien upon a policy taken by the mortgagor, although the mortgage provides that the mortgagee himself may insure. While a mortgagee, merely as such, has no interest in or claim to a policy of insurance effected by the mortgagor upon the property mortgaged for his benefit, and each has an insurable interest, and may effect separate insurance, yet one insurance for the benefit of both is generally provided for by a covenant or condition that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the policy should then be taken out by the mortgagor, payable to the mortgagee in case of loss, or the policy should be assigned to him. But if the mortgagor afterwards takes out a policy in his own name and fails to assign it, or to make it payable to the mortgagee, such a contract in the mortgage creates an equitable lien in favor of the mortgagee, upon the

¹ *Miller v. Aldrich*, 31 Mich. 408.

² *Lynch v. Dalzell*, 4 Bro. Parl. Cases, 431; *Neale v. Reid*, 3 Dowl. & Ry. 156, 158; *Powles v. Innes*, 11 M. & W. 10; *Carter v. Rockett*, 8 Paige (N. Y.), 437; *Wilson v. Hill*, 3 Met. (Mass.) 66; *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Pet. 507; *Carpenter v. Prov. Wash-*

ington Ins. Co. 16 Pet. 495; *Vandegraaff v. Medlock*, 3 Port. (Ala.) 389; *Hancox v. Fishing Ins. Co.* 3 Sum. 132; *McDonald v. Black*, 20 Ohio, 185; *Plimpton v. Ins. Co.* 43 Vt. 497; *Nichols v. Baxter*, 5 R. I. 491.

³ *Lees v. Whiteley*, L. R. 2 Eq. 143.

money due, for a loss under such a policy, to the extent of his interest, although the mortgage contained a provision that the mortgagee, in default of the mortgagor's insuring, might take out a policy at the expense of the mortgagor, and under the security of the mortgage, for the premiums. The insurance company, and an assignee of the policy on notice of the rights of the mortgagee prior to the assignment, are subject to the equity.¹

403. How far this equitable lien can affect another person who has subsequently acquired a specific assignment of the policy is a question not very definitely settled by the authorities.² In the case cited, there was no occasion for the court to go farther than to hold that this equitable lien was binding upon the mortgagor, and after his decease upon his legal representatives. Mr. Justice Archer, however, in delivering the opinion of the court, expressed the view that if the insurance policy or fund had been passed over by the mortgagor, for a valuable consideration without notice, to a third person, the right of such third person would prevail, because he would have an equity also; and having the possession, he would be protected, on the principle that the title of one who has both a fair possession and an equitable title shall be preferred to that of a mere equitable interest.

In another aspect of the case, the learned judge expressed views which go far towards sustaining the position that the lien created in favor of the mortgagee by the covenant for insurance is good against one who might afterwards take an assignment of the policy. "That this is a covenant running with the land can, we think, scarcely be doubted. The covenants to repair and rebuild are admittedly so. And what is this, but in effect a modified covenant to repair and build? The insurance is to be

¹ *Wheeler v. Ins. Co.* 101 U. S. 439; *Nichols v. Baxter*, 5 R. I. 491; and see *Miller v. Aldrich*, 31 Mich. 408.

² *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 372. Archer, J., said: "But here, the administrators have a mere naked legal right, subject to the mortgagee's equity. That the administrators represent the creditors cannot change the character of this equity of the mortgagee, or weaken its efficacy. The particular creditor and the general creditor stand in different attitudes. The former never trusted to the personal credit of the mortgagor, but trusted and looked to this particular fund,

to satisfy his debt or give him security for it. The general creditors trusted to a personal credit alone. What has produced this fund? The advance of money upon its faith. . . . But again: the covenant is expressly for the benefit of the particular creditor, not for the benefit of the general creditors; and if they participate in it, they get that which they never could have looked to, and the extent to which they derive advantage from it, to the same extent do they take from that creditor who looked exclusively to it." And see *Giddings v. Seevers*, 24 Md. 363.

kept up, so that in case of loss by fire the sum insured shall be immediately applied to rebuilding the property on the premises. Being of this character, it would run with the land, just as would an ordinary and absolute covenant to repair or rebuild; and running with the land, the record of the mortgage would be notice to all the general creditors, and they would, therefore, have no just pretensions to participate in the fund, to the prejudice of the particular creditor."

404. That the lien created by such a covenant is valid as against the mortgagor's assignee in bankruptcy was decided in a recent case in the District Court of the United States for the Northern District of Illinois,¹ and there was an intimation by the court that a specific assignment to a particular creditor would not have avoided the effect of the covenant.

405. In Maine it is provided by statute² that a mortgagee of any real estate shall have a lien upon any policy of insurance against loss by fire procured thereon by the mortgagor, to take effect from the time he files with the secretary of the company a written notice, briefly describing the mortgage, the estate conveyed, and the sum remaining unpaid thereon. If the mortgagor consents in writing filed with the secretary that the whole or a part of the sum secured by the policy shall be applied to the payment of the mortgage, the mortgagee's receipt shall be a sufficient discharge. If the mortgagor does not so consent, the mortgagee may, at any time within sixty days after a loss, enforce his lien by a suit against the mortgagor, and the company as his

¹ *In re Sands Ale Brewing Co.* 3 Biss. 175. Mr. Justice Blodgett said: "My conclusion then is, that the covenant by the bankrupt to insure operated to assign in equity to the petitioner the benefit of any insurance effected by the bankrupt on the mortgaged property. It is no answer to say that the mortgagee might have insured in default of insurance by the mortgagor, because the mortgagor had insured, and his insurance enured at once to the benefit of the mortgagee. It is urged by way of argument in behalf of one creditor — the Union National Bank — that if all or part of these policies had been assigned to that creditor, they could have been held then as against the petitioner, and that the assignee, holding for the benefit of all creditors, occupies the

same position; but this argument is fallacious, because it overlooks or ignores the fact that all creditors had notice of the petitioner's equitable right to this insurance money, and could acquire no valid interest therein as against him. Equity made this assignment the moment the insurance was effected if the mortgagor did not do it. . . . The lien is neither doubtful nor general, but is clear and specific. It is but carrying out the intent of the parties, and giving the mortgagee the security he had bargained for, and which he had given the whole world notice he was entitled to."

² Rev. Stat. 1871, c. 49, §§ 32-36. The statute annuls all provisions of a policy at variance with it. *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 322.

trustee, in which judgment may be rendered for what is found due upon the policy notwithstanding the time of payment of the whole sum secured by the mortgage has not arrived.¹ The amount recovered is first applied to the payment of the costs of suit, and then to the payment of the mortgage debt; and the balance, if any, is retained by the company and paid to the mortgagor. When two or more mortgagees claim the benefit of this lien, their rights are determined according to the priority of their claims and mortgages by the principles of law. When a mortgagee claims the benefit of this lien, any policy of insurance previously or subsequently procured by him on his interest as mortgagee is void, unless it is consented to by the company insuring the mortgagor's interest.

406. Loss payable to the mortgagee.—When a policy is taken in the name of the mortgagor, but the insurance is made payable to the mortgagee in case of loss, the contract is with the mortgagor, and is for the insurance of his interest, and the mortgagee can recover only in case the mortgagor could have done so, unless the policy contains special provisions in favor of the mortgagee.² The making of the policy payable to the mortgagee is regarded as an appointment to receive any money which might become due from the insurers by reason of any loss which the mortgagor might sustain. It is still a contract to indemnify the mortgagor against a loss, and not a contract to indemnify the mortgagee. Thus when a mortgagor has procured a policy "as his interest might appear," the loss, if any, payable to the mortgagee as collateral security for the mortgage debt, the mortgagee has no authority to consent to the cancellation of the policy; and if he does so, and takes out a new policy in his own name, he will have only the same rights under it that he had under the old pol-

¹ A mortgagee has no lien upon a policy procured by the mortgagor which the insurers have in good faith settled before the expiration of sixty days after loss, and before any notice of the loss has been filed with the secretary, although such notice be afterwards filed within the sixty days. *Burns v. Collins*, 64 Me. 215.

² *Franklin Savings Institution v. Central Mut. F. Ins. Co.* 119 Mass. 240; *Turner v. Quincy Mut. F. Ins. Co.* 109 Mass. 568; *Fogg v. Middlesex Mut. F. Ins. Co.* 10 Cnsh. (Mass.) 337; *Hale v. Mechanics' Mut. Fire Ins. Co.* 6 Gray (Mass.), 169;

Loring v. Manufacturers' Ins. Co. 8 Ib. 28; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313; *Smith v. Union Ins. Co.* 120 Mass. 90; *Fitchburg Savings Bank v. Amazon Ins. Co.* 125 Mass. 431; *Merwin v. Star F. Ins. Co.* 7 Hun (N. Y.), 659. The fact that the policy is payable to the mortgagee is not inconsistent with an allegation, in a criminal prosecution of the mortgagor for burning a building with intent to defraud the insurers, that the building was insured to the accused. *State v. Byrne* 45 Conn. 273; *S. C. 8 Ins. L. J.* 4, 28.

icy. Therefore, if a loss occurs, and the mortgagor restores the building to the same condition it was in before, the insurance is payable to the mortgagor and not to the mortgagee, the latter having sustained no loss or damage.¹ In a case before the Court of Appeals of New York,² Mr. Justice Harris described the rights of the parties in such a case as follows: "The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers." It was accordingly held in this case that the mortgagor having parted with his interest in the property before the loss, the mortgagee, to whom the loss was payable, could not recover. Such a result is generally prevented by a provision in favor of the mortgagee, that no alienation by the mortgagor shall affect the mortgagee's right to recover;³ and frequently protection is extended to the mortgagee so far as to prevent the invalidating of the policy by any act of the mortgagor or owner of the property insured.⁴

A stipulation that no sale or transfer of the property shall vitiate the right of the mortgagee to recover in case of loss, prevents a forfeiture of the policy as to his interest, after a sale of the property in consequence of the breach of a condition making the policy void if further insurance be obtained without the consent of the insurers. A necessary consequence of a sale is that the purchaser has a right to insure his interest. The object of the stipulation is to secure the insurance of the mortgagee's interest, and to avoid the defeat of this security by any sale or transfer of the property; and by a fair interpretation of the contract it means that the mortgagee's right to recover shall not be vitiated by any of the natural consequences or incidents of sale.⁵

Aside from any saving provision in favor of the mortgagee,

¹ *In re Moore*, 6 Daly (N. Y.), 541.

⁴ *Springfield F. & M. Ins. Co. v. Allen*,

² *Grosvenor v. Atlantic Fire Ins. Co.* of 43 N. Y. 389.

Brooklyn, 17 N. Y. 391.

⁵ *City Five Cents Sav. Bank v. Penn.*

³ *Macomber v. Cambridge Mut. F. Ins. F. Ins. Co.* 122 Mass. 165.
Co. 8 Cush. (Mass.) 133.

any act of the mortgagor, either in procuring the policy or in dealing with the property afterwards, which would avoid the policy as to him, will avoid it equally as to the mortgagee; as by a misrepresentation as to the use made of the property;¹ or a violation of one of the provisions of the policy in procuring over-insurance.² But no admissions or declarations by the owner after a loss are admissible to defeat a recovery by the mortgagee upon the policy.³

407. Equivalent to assignment. — The provision of a policy that the loss, if any, shall be paid to the mortgagee, operates to give the mortgagee precisely the same rights and interest in the policy which he would have if, without such words, the mortgagor had assigned the policy to him as collateral security to the mortgage debt.⁴

The insured can of course no more adjust a loss payable to the mortgagee than he could release it.⁵

In Massachusetts it is provided that in case of loss upon property hereafter insured within the terms of the fire insurance policies thereon, all such insurers thereof, upon the proper presentation of proofs by the claimants in accordance with the provisions of the policy, together with an authentic statement of the title, showing the rights and interests of all parties therein, shall pay all mortgages expressly protected by any policies taken out in the name of the mortgagor, in the order of their priority, to the extent of their respective policies or interests in their respective mortgage claims, before the owner of the equity of redemption in said property shall receive anything; but this provision does not

¹ *Merwin v. Star Fire Ins. Co.* 7 Hun (N. Y.), 659.

² *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401.

In California it is provided that where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

If an insurer assents to the transfer of an insurance from a mortgagor to a mort-

gagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights. Civil Code, §§ 2541, 2542; Codes & Stats. 1877, §§ 7541, 7542.

³ *Browning v. Home Ins. Co.* 71 N. Y. 508.

⁴ *Grosvenor v. Atlantic F. Ins. Co. of Brooklyn*, 5 Duer (N. Y.), 517; S. C. 17 N. Y. 391, 395; *Ennis v. Harmony F. Ins. Co.* 3 Bosw. (N. Y.) 516; *Luckey v. Gannon*, 37 How. (N. Y.) Pr. 134, 138.

Quoted with approval, Conn. Mut. L. Ins. Co. v. Scammon (C. C. Ill. 1880), 4 Fed. Rep. 263.

⁵ *Harrington v. Fitchburg Mut. F. Ins. Co.* 124 Mass. 126; S. C. 7 Ins. L. J. 618.

enlarge the amount which any insurance company would otherwise pay on account of any loss; and any payment so made by any such company under its policy in accordance with the provisions of this act, whether to the person named in the policy or not, shall be deemed and taken to be in payment and satisfaction of the liability of such company under its policy to the full extent of such payment.¹

408. Who may bring suit. — When the policy is taken out by the mortgagor in his name, payable in case of loss to the mortgagee, the mortgagor may, with the assent of the mortgagee, sue on the policy in his own name. The mortgagor in such case is the party for whose benefit the insurance really operates, whether payment be made to himself or to the mortgagee.² The contract of insurance in such case is with the mortgagor, notwithstanding the loss is payable to the mortgagee. This direction in the policy is not an assignment of it, and although it is assented to by the insurer, the contract with the mortgagor is not thereby merged or extinguished.³ In an action on such a policy by the mortgagor, the insurer may plead payment to the mortgagee as performance. The rights of the mortgagee, and of the insurers as well, may be protected in all cases by a payment of the money into court.⁴

There is some confusion and contradiction in the cases in regard to the right of action upon a policy procured by a mortgagor payable in case of loss to the mortgagee. The principle underlying the subject is, that the real party to the contract, in whom the entire interest in it is vested, is the proper party to enforce it. If a policy be taken by a mortgagee in this way, he alone dealing with the company and paying the premiums, he is the real party to the contract and the proper party to sue.⁵ In like manner, if the entire interest in the policy has been vested in the mortgagee, or assigned to him, or if the whole amount of the policy is made

¹ Acts 1878, c. 132, § 2.

² *Turner v. Quincy Mut. F. Ins. Co.* 109 Mass. 568; *Farrow v. Commonwealth Ins. Co.* 18 Pick. (Mass.) 53; *Patterson v. Triumph Ins. Co.* 64 Me. 500; *Jackson v. Farmers' Mut. F. Ins. Co.* 5 Gray (Mass.), 52; *Continental Ins. Co. v. Hulman*, 92 Ill. 145.

³ *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, and cases cited; *S. C. Franklin Ins. Co. v. Martin*, 8 Ins. L. J. 81, 134; *Grosvenor v. Atlantic F. Ins. Co. of*

Brooklyn 17 N. Y. 391; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Van Buren v. St. Joseph County Village F. Ins. Co.* 28 Mich. 398, 404; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 8 Ins. L. J. 120; *S. C. 68 Me.* 313.

⁴ *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140.

⁵ *Chamberlain v. N. H. F. Ins. Co.* 55 N. H. 249; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121.

payable to the mortgagee, without qualification express or implied, or it be less in amount than the debt, he may enforce it by suit.¹ Ordinarily, however, there remains by the very terms of a policy insuring the mortgagor, but payable to the mortgagee in case of loss, or by necessary implication from such a policy, an equitable interest in the mortgagor. A debt to the mortgagee is implied, and the making of the policy payable to him implies that his interest is limited to the amount of this debt. Therefore, in the ordinary case of a policy made in this way, there is a divided interest; partly in the mortgagor and partly in the mortgagee. The direction that payment in case of loss be made to the mortgagee is a contingent order or stipulation.² Sometimes the mortgagee is by statute, or by stipulation in the policy or charter of the company, given the right to enforce such a policy. But aside from authority so conferred, the mortgagor as a general rule, so long as he retains an insurable interest, may bring the suit. There can be no division of causes of action on a single insurance policy. Whoever sues must be able to enforce the whole liability.³ Therefore, when a partial interest in the policy remains in the mortgagor, the mortgagee cannot sue as the party to whom the loss is payable. And for the same reason if the policy cover property in part not subject to the mortgage, the mortgagee cannot sue upon it, either in his own name or that of the mortgagor.⁴ For if the suit be in his own name, with reference to his own interest, the insurers would be liable to another suit by the mortgagee upon the same policy; and if the mortgagee be allowed, against the consent of the mortgagor, to prosecute a suit in his name, the insurers would be required to pay one loss by instalments to different persons. Under the codes in force in some of the states, persons having several interests in such a contract might join in enforcing it.⁵

If, however, the mortgage clause in a policy be in legal effect

¹ *Hadley v. N. H. Fire Ins. Co.* 55 N. H. 110; S. C. 4 Ins. L. J. 611.

According to the practice in **New York**, so long as the mortgage debt remains unpaid, the action should be brought by the mortgagee in his own name, or he should be joined as a party. *Ennis v. Harmony F. Ins. Co.* 3 Bosw. 516; *Frink v. Hampden Ins. Co.* 45 Barb. 384; S. C. 31 How. Pr. 30; *Roussel v. St. Nicholas Ins. Co.*

41 N. Y. Superior Ct. 279; *Berthold v. Clay F. Ins. Co.* 2 Mo. App. 311.

² *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313.

³ *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609.

⁴ *Stearns v. Quincy Mut. F. Ins. Co.* 124 Mass. 61; S. C. 7 Ins. L. J. 506.

⁵ As in **Wisconsin**: *Strohn v. Hartford F. Ins. Co.* 33 Wis. 648; S. C. 37 Ib. 625; 3 Ins. L. J. 288.

an agreement to pay the insurance or any part of it directly to the mortgagee, recognizing him as a distinct party in interest, and not a mere appointment to pay the loss to him, he may maintain the action in his own name.¹

When a mortgagor effects an insurance, payable in case of loss to the mortgagee, the former holds the legal title, and may maintain an action on the policy for the use of the mortgagee.² The subsequent payment of the mortgage debt does not prevent a recovery against the insurance company; but the mortgagor may still recover in the name of the mortgagee, if necessary, or in his own name.³ A mortgagor, after making a policy payable to his mortgagee, can no more bind the mortgagee by an adjustment of the amount of the loss than he can bind him by a release of it.⁴

On the other hand if a mortgagee as such take out a policy upon his interest for the benefit of the mortgagor with the agreement that any sum that might be received for a loss should be credited upon the mortgage debt, the mortgagor is the proper party to maintain a suit.⁵

The mortgagor may in his own name enforce specific performance of a provision in the policy giving the insurers the election to rebuild, after they have made such election and neglected to perform the contract. The action is upon the contract to rebuild and not strictly upon the policy, and the cause of action is in the insured and not in the mortgagee.⁶

At common law the assignee of a policy of insurance cannot maintain an action upon it in his own name, and unless authorized so to do by general law or by the act incorporating the insurance company, the suit must be in the name of the insured for the use of the assignee.⁷

409. The mortgagee is bound to receive the whole insurance, and apply it to the debt. Where a policy of insurance is taken out by the mortgagor, payable to the mortgagee in case of loss, the insurer is bound to pay the whole loss to the mortgagee, who is holden to apply the amount received, so far as is necessary

¹ *Hartford F. Ins. Co. v. Olcott*, 97 Ill. 439; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141.

² *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354.

³ *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447.

⁴ *Harrington v. Fitchburg Mut. F. Ins. Co.* 124 Mass. 126.

⁵ *Aetna Ins. Co. v. Baker*, 71 Ind. 102.

⁶ *Heilmann v. Westchester F. Ins. Co.* 75 N. Y. 7; *S. C. 7 Reporter*, 305; 8 Ins. L. J. 53, 88.

⁷ *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Illinois F. Ins. Co. v. Stanton*, *supra*.

to discharge the mortgage; and in case the mortgage debt has been previously paid, the mortgagee would receive the sum paid for the use of the mortgagor. In such case, the continued existence of the mortgage debt is not essential to a recovery for the benefit of the mortgagor, because the policy is his, and is upon his interest, which is in no way diminished by the discharge of the mortgage.¹ If the policy contain a provision that "No sale of the property shall affect the right of the mortgagee to recover in case of loss, under this policy," and a sale be made before a loss occurs, the mortgagee is still bound to recover the amount from the insurers, and to apply the avails first to the discharge of the mortgage debt, and the surplus to the benefit of the mortgagor; and the insurers, if they have taken a transfer of the mortgage upon paying the loss, stand in no better position than the mortgagee, as they have full knowledge of the existence of the policy and of its provisions; and the purchaser of the equity of redemption is entitled to the benefit of the money paid on the loss, and may redeem upon paying the balance due upon the mortgage after deducting the amount payable for the loss.²

If it be provided in the mortgage that the mortgagor shall insure in a certain sum, for the benefit of the mortgagee, or that the mortgagee may cause the property to be insured at the expense of the mortgagor, and that the premium shall be covered by the mortgage security, then in effect the policy is furnished by the mortgagor, and any money recovered under it enures to him in going towards paying his debt to the mortgagee.³ The mortgagee receives the proceeds to apply in the first place to the payment of the mortgage debt, and then he is trustee for the mortgagor for any balance left in his hands.⁴ If in such case the mortgagee pays the premium, he may charge the amount in his account against the mortgagor. But in the absence of any such contract the mortgagee could not charge to the mortgagor a premium paid by him for insurance. Any insurance obtained by him on his own interest is for his own benefit. The fiduciary relation, existing between the mortgagee and mortgagor, in some limited

¹ Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Me. 447; King v. State Mutual Fire Ins. Co. 7 Cush. (Mass.) 1, per Shaw, C. J.; Suffolk F. Ins. Co. v. Boyden, 9 Allen (Mass.), 123; Clark v. Wilson, 103 Mass. 219, 221; Waring v. Loder, 53 N. Y. 581.

² Graves v. Hampden Fire Ins. Co. 10 Allen (Mass.), 281.

³ Wilcox v. Allen, 36 Mich. 160.

⁴ Fowley v. Palmer, 5 Gray (Mass.), 549; Mix v. Hotchkiss, 14 Conn. 32.

BY MORTGAGOR FOR BENEFIT OF MORTGAGEE. [§§ 410, 411.

matters, does not extend to such an insurance of the mortgagee's interest. Before entry for condition broken, that relation is a matter of contract.¹

If the holder of the mortgage receive the insurance money after the mortgage debt is due, and afterwards, without indorsing the amount received upon the mortgage note, assigns the note and mortgage, the mortgagor cannot maintain a bill to have this amount indorsed upon the note. His remedy is to redeem.²

410. When debt not due.— When the mortgaged property is insured for the benefit of the mortgagee such insurance is collateral to the debt, and money recovered from the insurance is still collateral, and cannot be applied by the mortgagee to payment of the mortgage debt without the consent of the mortgagor if the debt be not due, and the mortgagee has no right to demand payment, or upon default to convert the securities. If under such circumstances the money received from the insurance be paid by the mortgagee to the mortgagor, for restoring the premises so as to make them as valuable as before the fire, a second mortgagee has no equity to have the amount so received applied for his benefit in reduction of the debt secured by the first mortgage.³

But there may be circumstances which will make it incumbent upon a mortgagee who allows the mortgagor to apply the proceeds of an insurance to the restoration of the property to see that the mortgagor actually uses the money for this purpose. Other parties in interest may have an equity requiring the application of the insurance by the mortgagee to be either in payment of the debt due him, or in making the security to this extent more valuable.⁴

411. Insurers under such a policy have no claim to be subrogated. The insurers upon paying a loss upon a policy taken out by the mortgagor payable to the mortgagee in case of loss, or assigned to him, have no claim to be subrogated to the rights of the mortgagee.⁵ If after such a loss the mortgagee brings suit in the name of the assured upon the policies and obtains judg-

¹ *Dobson v. Land*, 8 Hare, 216; S. C. 4 De G. & S. 575; *Bellamy v. Brickenden*, 2 Jo. & Hem. 137; *King v. State Mutual Fire Ins. Co.* 7 Cush. (Mass.) 1.

² *Stevens v. Hayden*, 129 Mass. 328.

³ *Gordon v. Ware Savings Bank*, 115 Mass. 588.

⁴ *Conn. Mut. L. Ins. Co. v. Scammon* (C. C. Ill. 1880), 4 Fed. Rep. 263.

⁵ *Kernochan v. N. Y. Bowery Fire Ins. Co.* 17 N. Y. 428; S. C. 5 Duer, 1; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173. And see, also, *Washington Fire Ins. Co. of Balto. v. Kelly*, 32 Md. 421, as to right of subrogation upon loss pending contract of sale.

ment, but, instead of enforcing the judgment, enforces payment of the mortgage by foreclosure, the assured is entitled to the benefit of the judgment against the insurers, who have no claim to be relieved from the judgment.¹

412. Agreement to assign to insurers.— The effect of an insurance procured in this way is not qualified by a clause in the policy, that in case of loss the assured shall assign to the insurers an interest in the mortgage equal to the amount of the loss paid; or by an assignment made in pursuance of such a provision, or of any subsequent agreement between the parties. Under such an assignment the amount of the loss must be applied in reduction of the mortgage debt, and the insurers can hold the mortgage only for the balance of the debt remaining after such payment.²

Policies of insurance now generally provide that in case of the payment of any loss to a mortgagee, whose interest is insured, the insurers shall be subrogated to that extent to his rights under the mortgage.³

413. When a policy protects the mortgagee against the acts of the owner of the property in derogation of the policy, and provides for the subrogation of the insurers to the rights of the mortgagee, in case of payment to the mortgagee for a loss under the policy which the insurers would not have been liable to pay to the owner, the contract, from being primarily one insuring the mortgagor, and making the mortgagee an equitable assignee, is by these special provisions, upon the happening of certain events, resolved in effect into an insurance of the interest of the mortgagee, as such, and into a personal contract with the mortgagee, in which the mortgagor has no interest.⁴ The insurance money, when paid under such a policy to the mortgagee, is not a payment to that extent of the mortgage debt, but is in effect a payment by the insurers towards the purchase of the mortgage.

When the policy is made payable to a mortgagee he is generally protected against the acts of the owner of the property by a provision of the policy that it shall not be forfeited by any alienation or other act on his part. If a policy so providing also con-

¹ *Robert v. Traders' Ins. Co.* 17 Wend. (N. Y.) 631; reversing S. C. 9 Ib. 404.

² *Springfield F. & M. Ins. Co. v. Allen,* 43 N. Y. 389.

³ *Foster v. Van Reed,* 5 Hun (N. Y.), 321; *Waring v. Loder,* 53 N. Y. 581; *Davis v. Quincy Mut. F. Ins. Co.* 10 Allen (Mass.), 113.

⁴ *Ulster Co. Sav. Inst. v. Leake,* 73 N. Y. 161, reversing S. C. 11 Hun, 515; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141.

tain a further provision that in case of a payment of the loss to the mortgagee the insurer shall be entitled to an assignment of the mortgage, upon the happening of a loss and the assignment of the policy to the insurers, it will be a valid security in their hands if the mortgagor or owner of the property, to whom the policy was issued, has alienated the property prior to the loss, so that the policy has become void as to him, though saved from forfeiture as against the mortgagee. The principal party insured then has no right to claim the sum paid upon the loss as a payment on the mortgage debt.¹

A provision in a policy obtained by the mortgagor and payable to a mortgagee, that "no sale or transfer of the property insured shall vitiate the right of the mortgagee to recover in case of loss," as a necessary consequence, protects the mortgagee from the acts of any subsequent purchaser or mortgagee, although those acts be in violation of provisions of the policy; as, for instance, a provision making the policy void if the assured should obtain further insurance without giving written notice to the insurance company and obtaining its consent. A necessary consequence of a sale of the property is that the purchaser has a right to insure his interest; and the object of the stipulation being to avoid the defeat of the policy by any sale or transfer of the property, the fair interpretation of the stipulation is that the mortgagee's right to recover shall not be vitiated by any of the natural consequences or incidents of a sale.²

Of course if a mortgagee, by an indorsement upon the policy, stands merely in the position of one to whom the policy is made payable without any stipulation for his protection against the acts of the assured, his right to recover may be vitiated by the violation of any of the provisions of the policy by any owner or occupant of the premises.³ The mortgagee does not in such case become an assignee of the policy, and can recover only what the assured could recover. If a policy be assigned to a mortgagee, and he gives a deposit note and becomes liable to assessments, a new contract of insurance is created, which is in effect an insur-

¹ *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389. *v. Mechanics' Mut. F. Ins. Co.* 6 Gray, 169; *Fogg v. Middlesex Mut. F. Ins. Co.*

² *City Five Cents Savings Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165. 10 Cush. (Mass.) 337; *Loring v. Manufacturers' Ins. Co.* 8 Gray (Mass.), 28;

³ *Franklin Savings Institution v. Central Mut. F. Ins. Co.* 119 Mass. 240; *Hale Van Buren v. St. Joseph County Village Ins. Co.* 28 Mich. 398.

ance of the mortgagee's interest, and in that case he is not affected by the subsequent acts of the party originally insured.¹

413 a. Condition against procuring other insurance. — A policy taken by a mortgagor for the benefit of the mortgagee provided that it should become void if the assured should, without the written consent of the insurers, obtain other insurance upon the property. The mortgagee, without the knowledge of the mortgagor and before default, procured other insurance payable to himself as mortgagee. The insurers contended that the mortgagor's policy was rendered void by a breach of this condition; but it was held that there was no breach of the condition, although the policy contained a clause that the mortgagor should keep the mortgaged buildings insured for the benefit of the mortgagee, who was authorized in case of default to procure insurance; for inasmuch as the mortgagor was not in default, the mortgagee, in procuring insurance, acted for himself and not as the mortgagor's agent.²

414. When mortgagee may charge for insurance. — Insurance effected by a mortgagee upon the mortgaged estate, without any provision authorizing him or obligating the mortgagor to do so, cannot be charged to the mortgagor.³ But if the mortgage contains a condition that the mortgagor shall "keep the buildings standing on the land aforesaid insured against fire in a sum not less than twenty-five hundred dollars, for the benefit of the said mortgagee," and the mortgagor fails to insure, the mortgagee may effect insurance, and is entitled to credit for the premiums paid by him.⁴ For a still stronger reason is this the case when the mortgage provides that upon the failure of the mortgagor to keep this condition the mortgagee may insure.⁵ The mortgagor, having failed to comply with his contract, cannot take advantage of his own wrong and decline to pay the premium. The condition that the mortgagor should insure distinguishes the case from that class of cases where the mortgagee insures his own interest in the mortgaged premises; such insur-

¹ *Foster v. Equitable Mut. F. Ins. Co.*
² *Gray (Mass.)*, 216.

³ *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410.

⁴ *Dobson v. Land*, 8 Hare, 216; *S. C.*
⁵ *De G. & S.* 575; *3 Bennett's F. Ins. Cases*, 147, n.; *Saunders v. Frost*, 5 Pick. (Mass.) 259; *Faure v. Winans*, Hopk. (N. Y.) 283.

⁴ *Fowley v. Palmer*, 5 Gray (Mass.), 549. The insurance in this case was payable to the mortgagee "for whom it may concern." *Barthell v. Syverson*, 54 Iowa, 160.

⁵ *Overby v. Fayetteville Building & Loan Ass.* 81 N. C. 56.

ance he must effect at his own expense. Then he is not holden to account for the proceeds. But when the mortgagee gives the mortgagee the right to insure at the expense of the mortgagor, and he does so, and charges the premium to the mortgagor, the amount received from the insurance must be accounted for towards the payment of the mortgage debt. Although it may be difficult to prove that the mortgagee in any particular case effected the insurance under the provision of the mortgage and at the expense of the mortgagor, so that he is accountable for the proceeds, the difficulty is one brought upon the mortgagor by his own failure to perform his contract ;¹ and if he has no such proof he must take the mortgagee's word for it.

But he cannot charge for premiums paid for insurance to a larger amount than is stipulated for in the mortgage.²

The mortgagor will not be allowed for insurance effected by himself, in the absence of any stipulation in the mortgage that the mortgagor shall keep the property insured for the mortgagee's benefit, or that premiums of insurance paid by the mortgagee shall be a charge upon the property.³

415. Rule is the same under a condition to keep insurance, not in the form of a direct covenant, as where the condition was,⁴ that if the grantor should repay the loan, "and, until such payment, keep the buildings standing on the land aforesaid insured against fire, in a sum not less than \$250, for the benefit of the mortgagee, and payable to him in case of loss, at some insurance office approved by him ; or, in default thereof, shall, on demand, pay to said mortgagee all such sums of money as the said mortgagee shall reasonably pay for such insurance, with interest," then the deed should be void.

In Connecticut it is provided by statute that premiums paid by the mortgagee of any property, for insuring his interest therein against loss by fire, shall be deemed to be a part of the mortgage debt, and shall be refunded to him before he can be required to release his title.⁵

¹ Per Chief Justice Shaw, in *Fowley v. Palmer*, *supra*.

² *Conover v. Grover*, 31 N. J. Eq. 539.

³ *Clark v. Smith, Saxt.* (N. J. Eq.) 121, 137; *Saunders v. Frost*, 5 Pick. (Mass.) 259; *Faure v. Winans*, Hopk. (N. Y.) 283; *Pierce v. Faunce*, 53 Me. 351.

⁴ *Nichols v. Baxter*, 5 R. I. 491. The form of mortgage in this case is the ordi-

nary form used in Massachusetts. See, also, *Barthell v. Syverson*, 54 Iowa, 160.

⁵ Gen. Stat. 1875, p. 358. See English statute providing for adding to the principal sum secured premiums paid by the mortgagee for insurance, which, by the terms of the deed, should be obtained by the mortgagor, 23 & 24 Vict. c. 145, §§ 11, 12.

416. A mortgagee charging for insurance is liable as an insurer. If he charges the mortgagor with the premiums for an insurance for a certain time as part of the loan, and undertakes to procure the insurance, he is bound to keep the policies alive during that period, and he is himself liable as an insurer if in consequence of his neglect to pay the premiums the policies expire.¹ The extent of the liability is the same as an insurance company's would have been had the policies been continued by the payment of the premiums.

417. A return premium upon a policy procured by the mortgagor and assigned to the holder of a mortgage, which is subsequently paid by a purchaser of the equity of redemption, in accordance with his agreement with the mortgagor to assume and pay it, belongs to the mortgagor, and he may recover the amount of it from any one else who collects it.²

But where a mortgagee took out a policy in which the mortgagor was named as the assured, but it was made payable in case of loss to the mortgagee, and it was stipulated that the assured might terminate the policy at any time, in which case the insurance company could retain a proportionate part of the premium, and shortly afterwards the mortgagee sold the land under a power of sale, and the policy was cancelled and a new one issued to the purchaser, without any rebate being paid to the mortgagee, it was held that the mortgagor could not recover the rebate of premium from the mortgagee. The mortgagor should either have surrendered the policy immediately before the sale with the mortgagee's consent, or should have sold the policy to the purchaser, and obtained the consent of the insurance company thereto.³

Upon a foreclosure sale a mortgagee to whom a policy has been transferred as collateral security for the mortgage debt is entitled to the deposit premium, when by the terms of the policy the insurable interest of both the mortgagee and mortgagor is divested, and the proceeds of the sale are insufficient to pay the mortgage debt.⁴

¹ *Soule v. Union Bank*, 45 Barb. (N. Y.) 111; S. C. 30 How. Pr. 105.

² *Merrifield v. Baker*, 9 Allen (Mass.), 29; *Felton v. Brooks*, 4 Cush. (Mass.) 203; *Rafsnnyder's Appeal*, 88 Pa. St. 436; S. C. 19 Alb. L. J. 262.

³ *Parker v. Smith Charities*, 127 Mass. 499.

⁴ *Rafsnnyder's Appeal*, 88 Pa. St. 436; S. C. 7 Reporter, 537.

3. *Insurance by the Mortgagee.*

418. Insurance obtained by the mortgagee when the mortgage contains the usual covenant for insurance on the part of the mortgagor, and an agreement that, in case of his failure to do so, the mortgagee or his representatives may make such insurance, and the mortgage shall secure the repayment of the premiums, is not necessarily presumed to be under this authority, especially if it be taken "on his interest as mortgagee."¹ A mortgagee may insure his interest as mortgagee, and he may make such terms with the insurer as they may agree upon. When, therefore, the mortgagee procures a policy with a provision that in case of loss the assured shall assign to the insurer an interest in the mortgage equal to the amount of loss paid, this provision is paramount to the contract between the mortgagor and mortgagee, and the insurer is entitled, upon payment of a loss under the policy, to an assignment of the mortgage; and in an action to foreclose the mortgage the mortgagor cannot claim an application of the amount of the insurance as payment upon the mortgage.² Such a case is distinguished from cases where there was no agreement in the policy obtained by the mortgagee as to subrogation. If there be nothing in the policy inconsistent with the contract between the mortgagor and mortgagee, this contract may be regarded as an explanation of the policy by the latter in his own name; and the policy will be regarded as having been obtained under the provisions of the mortgage and for the benefit of the mortgagor. Thus in a case before the Court of Appeals in New York,³ upon a policy effected under such a provision in the mortgage, Mr. Justice Andrews said: "The authority given in the mortgage was an authority to the mortgagee to procure an insurance for the benefit of both parties. This is the fair interpretation. It was immaterial to the mortgagor whether the insurance was in his name or in the name of the mortgagee, if the avails of it in case of loss should apply in reduction of the debt. The mortgagee had no interest to procure an insurance limited to his own protection merely, where the expense was to be paid by the other party and was secured on the land." There is an implied obligation arising from the procuring of the insurance upon the request of the mortgagor, or at his expense, that the insurance money when paid shall be

¹ *Foster v. Van Reed*, 70 N. Y. 19, reversing S. C. 5 Hun (N. Y.), 321.

² *Foster v. Van Reed*, *supra*.

³ *Waring v. Loder*, 53 N. Y. 581.

applied to the mortgage debt.¹ Whenever the insurance has been effected at the request, or by the authority of the mortgagor, or at his expense, or under circumstances that would make him chargeable with the premium, he is entitled to have the money paid on the policy applied to the extinguishment of his debt.² The insurance having been paid for by the mortgagor, though taken in the name of the mortgagee as if absolute owner, the fact that the mortgagor has paid the debt secured by the mortgage does not prevent a recovery for a loss against the insurers. The mortgagor in such case is the beneficial party, and has the right to recover in the name of the mortgagee.³

Where a mortgagee holding a mortgage containing the usual insurance clause, obtained at the expense of the mortgagor, a policy insuring him as mortgagee, and afterwards upon taking an additional mortgage upon the same property, also containing the insurance clause, applied for a new policy to cover both amounts, and a policy was issued which contained an additional clause, providing that the insurance company should only be liable for any deficiency that might remain after the mortgagee had exhausted his primary security, and this clause was not noticed till after a loss occurred, it was held that the insertion of this clause was a fraud upon the mortgagee, and that the policy should be reformed by striking out this clause.⁴

419. An insurance of mortgagee's interest is not an insurance of the mortgage debt, as has been said in some cases, nor is it an indemnity against the loss of that debt by a loss or damage to the property mortgaged, so that if the mortgaged property after the loss is still enough in value to pay the debt, there has been in effect no loss.⁵ This subject was fully explained by Mr. Justice Folger, in a recent case before the Court of Appeals in New York,⁶ and he clearly shows that the insurance of a mortgage

¹ *Holbrook v. Am. Ins. Co.* 1 Curtis, 193; *Buffalo Steam-Engine Works v. Sun Mut. Ins. Co.* 17 N. Y. 401, 406; *Clinton v. Hope Ins. Co.* 45 N. Y. 454.

² *Honore v. Lamar F. Ins. Co.* 51 Ill. 409; *Stinchfield v. Milliken*, 71 Me. 567.

³ *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442.

⁴ *Hay v. Star F. Ins. Co.* 13 Hun (N. Y.), 496.

⁵ *Smith v. Columbia Ins. Co.* 17 Pa. St. 253, per Gibson, J.; *Ætna F. Ins. v. Tyler*, 16 Wend. 385, 397, per Chancel-

lor Walworth; *Carpenter v. Providence Washington Ins. Co.* 16 Peters, 495, 501, per Story, J.; *Kernochan v. N. Y. Bowery Fire Ins. Co.* 17 N. Y. 428, per Strong, J.; *Mathewson v. Western Assurance Co.* 4 L. Can. Jur. 57.

⁶ *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343, 357, per Folger, J. "Fire underwriters in these days, in this state, are the creatures of statute, and have no rights, save such as the state gives to them. They may agree that they will pay such loss or damage as

interest is not an insurance of the debt, but of the interest of the mortgagee in the property upon the safety of which depends his security, and that upon the happening of a loss the insurer is bound to make good the loss without regard to the value of the property remaining.

420. Insurer subrogated to rights of mortgagee. — It being

happens by fire to property. They are limited to this. It was not readily that it was first held that they could agree, with a mortgagee or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it: how then can he insure it? was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire, without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt, and for indemnification against its loss; but still remained one upon the property, and against loss or damage to it. It is doubtless true, as is said by Gibson, J., in 17 Penn. *supra*, that in effect it is the debt which is insured. It is only as an effect, however; an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property, creates that interest. The agreement is usually, as it is in fact in this case, for insuring, from loss or damage by fire, the property. The interest of the mortgagor is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, or so safe, or so valuable, as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mort-

gagee sought insurance and paid his premium.

"To say that it is the debt which is insured against loss, is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor. No one will contend this; and it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire. This is but coming to our position: that it is the property which is insured against the loss by fire, and the protection of the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limit of his liability, irrespective of the value of the property destroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer by loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance."

settled that an insurance made by a mortgagee of his own interest, at his own expense, and upon his own motion, is an insurance of his interest in the property, and not of the debt secured, and that the insurers are liable to pay him the whole amount of the damage to the property, it remains to be considered whether either the mortgagor can claim that the payment shall be applied in discharge of his debt, or the insurers can claim the mortgage security by assignment or subrogation.

In the first place it is the undisputed doctrine of all the cases that the mortgagor himself can claim no benefit from such insurance.¹ The question in dispute is, whether, upon payment of the loss under such a policy, the insurer shall be subrogated to the security held by the mortgagee, or whether he may, after having collected the insurance money, proceed to collect the mortgage debt from the mortgagor, and the property mortgaged.

The general rule and the weight of authority is, that the insurer is thereupon subrogated to the rights of the mortgagee under the mortgage. This is put upon the analogy of the situation of the insurer to that of a surety.² The mortgagor and mortgagee have each an insurable interest. If the mortgagee obtain insurance on his own account, and the premium is not paid by or charged to the mortgagor, he cannot claim the benefit of a payment of the policy; but the insurer is entitled to be subrogated to the claim of the mortgagee, and may recover upon the note.³

Upon this principle it has been held that, upon payment of the mortgage debt, the equitable liability of the mortgagee to the mortgagor for the money received from the insurers is a sufficient consideration to support a promise by the mortgagee to allow the amount secured by him upon the mortgage debt, and that an action may be maintained on such promise.⁴

¹ *Dobson v. Land*, 8 Hare, 216; *S. C.* 4 De G. & Sm. 575; *Bellamy v. Brickenden*, 2 Johns. & Hem. 137; *Russell v. Southard*, 12 How. 139. 157; *White v. Brown*, 2 Cush. (Mass.) 412; *Fowley v. Palmer*, 5 Gray (Mass.), 549; *Clark v. Wilson*, 103 Mass. 219, 221; *Ely v. Ely*, 80 Ill. 532; *Foster v. Van Reed*, 70 N. Y. 19; *Stinchfield v. Milliken*, 71 Me. 567.

² *Honore v. Lamar F. Ins. Co.* 51 Ill. 409; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541, 555; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442.

³ *Excelsior F. Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343; *Kernochan v. N. Y. Bowery F. Ins. Co.* 17 N. Y. 428; *Ætna Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 397; *Foster v. Van Reed*, 70 N. Y. 19; *Cone v. Niagara F. Ins. Co.* 60 N. Y. 619, 624; *De Wolf v. Capital City Ins. Co.* 16 Hun (N. Y.), 116; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. (N. J.) 541; *Callahan v. Linthicum*, 43 Md. 97, and cases cited.

⁴ *Callahan v. Linthicum*, *supra*, *Alvey and Grason, JJ.*, dissenting.

421. King v. State Mutual Fire Insurance Co.—If insurance be effected upon the interest of the assured as mortgagee, at his own expense, the insurers, upon payment of a loss and tender of the balance due on the mortgage, have in some courts been held not entitled to have the mortgage assigned to them, or to be subrogated to the rights of the assured under the mortgage, either at law or in equity. The mortgagee's insurance is not an insurance of the debt, although the amount of that is the measure of his insurable interest in the property.¹ The insurer has no interest in the mortgage debt; and there is no privity between him and the mortgagor. Neither can the mortgagor claim any part of the money so recovered as a payment of the mortgage debt, in

¹ King v. State Mutual Fire Ins. Co. 7 Cush. (Mass.) 1. In this case Chief Justice Shaw said:—

"The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of the debt. He afterwards secures the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt?"

"He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

"But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money ex-

pressed. Taking the risk or remoteness of the contingency into consideration, in other words, the computed chances of loss, the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. . . . Suppose—for, in order to test a principle, we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent.; the creditor may pay a sum, equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premium paid.

"What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent."

See, also, Suffolk Fire Ins. Co. v. Boyden, 9 Allen (Mass.), 123; Foster v. Equitable Mut. F. Ins. Co. 2 Gray (Mass.), 216; Concord Union Mut. Fire Ins. Co. v. Woodbury, 45 Ma. 447; Cushing v. Thompson, 34 Ma. 496; Clark v. Wilson, 108 Mass. 219, 221.

whole or in part; but he must still pay the whole mortgage debt to the mortgagee.¹ If, however, the mortgage debt was paid, and the mortgage discharged before the loss occurred, the mortgagee's insurable interest having terminated, he has no claim to recover.

4. *A Mortgage is not an Alienation.*

422. With reference to the usual provision in the policy of insurance, that it shall become void upon an alienation of the property insured, or upon any transfer or change of title, it is held that a mortgage is not an alienation or change of title until foreclosure is complete.²

423. If, however, the mortgage is by a deed absolute in form, this operates as a transfer or change of title, and puts an end to an insurance conditioned to be void in that event,³ although there be a defeasance executed at the same time, if this be not recorded in accordance with a statute providing that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance, as against any person other than the maker of the defeasance or his heirs or devisees, or persons having actual notice thereof.⁴

Some courts, however, hold that a conveyance which equity will treat as a mortgage does not terminate the interest of the

¹ *King v. State Mutual Fire Ins. Co.* 7 Cush. (Mass.) 1; *White v. Brown*, 2 Cush. (Mass.) 412; *Cushing v. Thompson*, 34 Me. 496; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447; *Bean v. Atlantic & St. Lawrence R. R. Co.* 58 Maine, 82; *McIntire v. Plaisted*, 68 Maine, 363.

² *Jackson v. Mass. Mut. Fire Ins. Co.* 23 Pick. (Mass.) 418; *Rice v. Tower*, 1 Gray (Mass.) 426; *Pollard v. Somerset Mut. Fire Ins. Co.* 42 Me. 221; *Smith v. Monmouth Mut. Fire Ins. Co.* 50 Me. 96; *Shepherd v. Union Mut. Fire Ins. Co.* 38 N. H. 232; *Dutton v. N. Eng. Mut. Fire Ins. Co.* 9 Fost. (N. H.) 153; *Rollins v. Columbian Mut. Fire Ins. Co.* 5 Ib. 200; *Folsom v. Belknap County Mut. Fire Ins. Co.* 10 Ib. 231; *Conover v. Mut. Ins. Co. of Albany*, 3 Denio, 254; *S. C. 1 Comst. (N. Y.)* 290; *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50. *Contra*, see *M'Culloch v. Indiana Mut. Fire Ins. Co.* 8 Blackf.

(Ind.) 50; *Indiana Mut. Fire Ins. Co. v. Coquillard*, 2 Ind. 645.

³ *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279. "There may be a transfer or change of title without a sale. Should A. convey a piece of property to B. to hold in secret trust for him, there would be a transfer or change of title from A. to B., but there would be no sale of the property or an actual parting with it to B. for a valuable consideration, although the conveyance on its face would import a sale from A. to B. And if the trust, instead of being secret, appeared on the face of the conveyance, there would still be a change of title. The title would no longer be in A. but in B., his grantee. We think such a conveyance would clearly come within the condition of the policy and put an end to the insurance."

⁴ *Foote v. Hartford Ins. Co.* 119 Mass. 259; *Tomlinson v. Monmouth Mut. F. Ins. Co.* 47 Me. 232.

A MORTGAGE IS NOT AN ALIENATION. [§§ 424-424 a.

assured, or make void the policy under the alienation clause.¹ If there be a written defeasance which is seasonably recorded, the two instruments constitute a mortgage as effectually as if the defeasance were contained in the deed, and there can be no pretence that there is an absolute conveyance.² But if the defeasance be not recorded, the deed is an alienation which will avoid the policy.³

424. Entry to foreclose.—Where a policy provided that “the entry of a foreclosure of a mortgage” should be deemed an alienation of the property, and the company should not be holden for any loss occurring afterwards, it was held that this did not mean an actual and complete foreclosure, but had reference to an entry by the mortgagee upon a breach of condition for the purpose of foreclosure. Under the system of foreclosure in use in Massachusetts, such entry duly recorded, and followed by possession for three years, accomplishes a foreclosure.⁴

424 a. A condition making a policy void in case foreclosure proceedings are commenced against the insured property is not inconsistent with a clause making the policy payable to the mortgagee in case of loss. In regard to such a policy it was contended in behalf of the mortgagee that the insurers having issued such a policy, with notice of the interest of the mortgagee in the property, and with an agreement to pay him the loss, if any, they could not afterwards call in question the natural result and incident of such mortgage title, namely, the foreclosure thereof, but must be held to have agreed to it in advance. But it was held otherwise.⁵

¹ *Holbrook v. American Ins. Co.* 1 Curtis C. C. 193; *Hodges v. Tennessee Marine & Fire Ins. Co.* 8 N. Y. 416; and see *Tittmore v. Vt. Mut. Fire Ins. Co.* 20 Vt. 546.

² *Smith v. Monmouth Mut. F. Ins. Co.* 50 Me. 96.

³ *Tomlinson v. Monmouth Mut. F. Ins. Co.* 47 Me. 232.

⁴ *McIntire v. Norwich Fire Ins. Co.* 102 Mass. 230.

The court say: “The first step towards foreclosure is the manifestation of the intent to foreclose, which is to be indicated in such manner as the law points out, accompanied with a formal registration in the public records. It is very manifest, as we think, that the words ‘the entry of

a foreclosure,’ as used in the policy, are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. The policy provides not merely for the transfer but the change of title, and the insurer may very naturally have considered an entry for foreclosure as a material change in the title of the assured and in his relation to the property. The parties in their contract have taken pains to avoid saying simply that ‘the foreclosure of a mortgage’ shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them.”

⁵ *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410. The court, in reply to this argu-

425. But when the title becomes absolute in the mortgagee by a strict foreclosure, or by a foreclosure effected by entry and possession, or when the title passes to another by a sale under a power contained in the mortgage, or by a sale under a decree of court in a foreclosure suit, the transfer is then complete, and the change of title is an alienation within the terms of the policy of insurance.¹ But when there is a right of redemption after sale, and there is no change of possession until the period for redemption has expired, the foreclosure does not operate as "a sale, transfer, or change in title," within the meaning of a policy, so as to defeat a recovery for a loss accruing after the sale, and before the expiration of the time of redemption.²

In case, however, the foreclosure is effected by the mortgagor

ment say: "This reasoning does not carry conviction to our minds. A provision that a policy shall be void in the case of foreclosure proceedings is common in insurance policies, and we must assume that experience has shown to underwriters that such proceedings increase the risk to the insurer. The insurance company might have been willing, for the premium charged, to insure this barn with the mortgage upon it, and yet not willing to insure it in case of proceedings to foreclose the mortgage. It did assent to the mortgage, and agree that the loss, if any, be paid to the mortgagee, but it did not assent to continue the insurance in case the risk was increased by proceedings to foreclose the mortgage. Before commencing the foreclosure the plaintiff should have obtained the assent of the insurance company. It might have examined the circumstances and granted such assent without any conditions, or it might have required an additional premium for the increased risk. It might have refused altogether, and in that case the plaintiff could have delayed his foreclosure until the end of the year, or surrendered the policy and procured insurance elsewhere. Even if the provision were found to be very inconvenient and embarrassing, there is no help for it. There it is, and we cannot take it out of the policy by construction. There are two provisions: one, that liens, without the assent of the company, shall avoid

the policy; and another, that foreclosure proceedings shall avoid it; and effect must be given to both. According to the construction contended for on the part of the plaintiff, the latter provision would be wholly useless or nullified in every case, because all liens avoid the policy unless assented to, and according to that construction, when assented to, foreclosure proceedings may be instituted without avoiding the policy. If such proceedings may be instituted as incident to the mortgage, then they may be carried to their conclusion by a sale and conveyance, and thus, by assenting to a mortgage, a company may be held to have assented to a change of title of the insured property. Such a construction is unreasonable and unwarranted." But in this case it was held that the insurance company had by its acts waived the forfeiture.

¹ *Macomber v. Cambridge Mut. F. Ins. Co.* 8 Cush. (Mass.) 133; *McLaren v. Hartford Fire Ins. Co.* 5 N. Y. 151; *Mt. Vernon Manuf. Co. v. Summit Co. Mut. Fire Ins. Co.* 10 Ohio St. 347; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Campbell v. Hamilton Mut. Ins. Co.* 51 Me. 69; *Abbott v. Hampden Mut. F. Ins. Co.* 30 Me. 414; *Brunswick Sav. Inst. v. Commercial Union Ins. Co.* 68 Me. 313; S. C. 8 Ins. L. J. 86, 120; *McKissick v. Mill Owners' Mut. F. Ins. Co.* 50 Iowa 116.

² *Loy v. Home Ins. Co.* 24 Minn. 315; S. C. 7 Ins. L. J. 763.

for the benefit of the mortgagee, who signs the premium note and pays the assessments, foreclosure is not an alienation, if the mortgagee thereby obtains absolute title to the property, as he is already the person liable under the contract of insurance.¹

426. Alteration of ownership. — But a mortgage is a violation of a condition against an "alteration of ownership,"² as also of a condition against a sale or alienation "in whole or in part."³ A breach of such or other like condition avoids the policy; and the breach is sufficiently established, in the absence of any evidence to the contrary, by putting in evidence a certified copy of the record of the mortgage.⁴

A conveyance and mortgage back to secure the purchase money is such an alienation as will avoid a policy upon the property, although it is provided that the mortgagee shall retain possession until the purchase money is paid.⁵ But a conveyance by the insured, with a simultaneous reconveyance in trust for the first grantor, is held not to be such an alienation or transfer.⁶ And so if the sale and reconveyance constitute merely a conditional sale, they are regarded as parts of one entire contract, and are held not to be such an alienation as will avoid the policy.⁷

A foreclosure of a mortgage is such a transfer of the property as will terminate an insurance conditioned to be void, "if any change shall take place in the title or possession of the property," or "if the property is disposed of, so that all interest on the part of the assured has ceased."⁸

427. If the mortgagor has already assigned the policy to the mortgagee with the consent of the insurers, his subsequent transfer of the equity of redemption is no breach of the stipulation in the policy against alienation, so far as the assignee is concerned.⁹

¹ *Bragg v. N. E. Mut. Fire Ins. Co.* 5 *Fost.* (N. H.) 289.

² *Edmands v. Mut. Safety Fire Ins. Co.* 1 *Allen* (Mass.), 311.

³ *Abbott v. Hampden Mut. Fire Ins. Co.* 30 *Me.* 414; *Bates v. Com. Ins. Co.* 2 *Cincinnati Supr. Ct.* (Ohio) 195.

⁴ *Gould v. Holland Purchase Ins. Co.* 16 *Hun* (N. Y.), 538.

⁵ *Tittlemore v. Vt. Mut. Fire Ins. Co.* 20 *Vt.* 546; *Moulthrop v. Farmers' Mut. F. Ins. Co.* 52 *Vt.* 123.

⁶ *Morrison v. Tenn. Mar. & Fire Ins. Co.* 18 *Mo.* 262.

⁷ *Tittlemore v. Vt. Mut. Fire Ins. Co.* *supra.*

⁸ *Bishop v. Clay F. & M. Ins. Co.* 45 *Conn.* 430.

⁹ *Foster v. Equitable Mut. Fire Ins. Co.* 2 *Gray* (Mass.), 216; *Fogg v. Middlesex Mut. Fire Ins. Co.* 10 *Cush.* (Mass.) 337; *Bragg v. N. Eng. Mut. Fire Ins. Co.* 5 *Fost.* (N. H.) 289; *Boynton v. Clinton & Essex Mut. Ins. Co.* 16 *Barb.* (N. Y.) 254.

This view has been criticised in some courts as contrary to the principle of public policy, that no man shall be allowed to bargain for an advantage to arise from the destruction of property.¹

¹ *Kernochan v. N. Y. Bowery F. Ins. Co.* 17 N. Y. 428.
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CHAPTER XI.

FIXTURES.

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| I. Rules for determining what fixtures a mortgage covers, 428-443. | III. Rolling stock of railways, 452. |
| II. Machinery in mills, 444-451. | IV. Remedies for removal of fixtures, 453-455. |

1. *Rules for determining what Fixtures a Mortgage covers.*

428. In general.¹ — A mortgage of real property, as a general rule, carries as part of the security all fixtures belonging to the realty, without any special mention of them being made in the conveyance. In determining what chattels when annexed to the land become fixtures, and therefore bound by a mortgage, very much the same rules apply as between a grantor and his grantee in case of an absolute conveyance;² but although in the case of a deed the construction is generally favorable to holding that things attached to the land are part and parcel of the realty, rather than personalty, yet in the construction of a mortgage even greater favor in the same way seems to be shown the mortgagee. The reason seems not to be far away. When the question arises under a mortgage, the mortgagor always has the right to redeem, and in this way to gain the benefit of any addition made to the realty; and any one claiming under him has only his rights, and acquires these with full knowledge of the incumbrance and of the condition of the property.

All buildings and other fixtures annexed to the freehold become part of it, and enure to the benefit of those who are entitled to it; both to the mortgagee as an increased security for his debt, and to the mortgagor to the same extent as enhancing the value of his equity of redemption. The latter can obtain the full benefit of all improvements he has made by paying his debt and regaining his estate by redemption. This rule, and the exceptions

¹ See, also, on this subject Jones on 167; Main v. Schwarzwaelder, 4 E. D. Chattel Mortgages, §§ 123-137. Smith (N. Y.), 273; Robinson v. Pres-

² Longstaff v. Meagoe, 2 Adol. & El. wick, 3 Edw. (N. Y.) 246.

to it as well, are applicable to deeds of trust equally with mortgages.¹

429. The intention with which an article of personal property is attached to the realty, whether for temporary use or for permanent improvement, has within certain limits quite as much to do with the determination of the question whether it has thereby become a permanent fixture, as has the way and manner in which it is attached.² If it is something necessary for the proper enjoyment of the estate, it may be presumed that it was annexed for its permanent improvement, and therefore that it goes to the benefit of the mortgagee. The fixtures may be so adapted to the building in which they are placed, and to the purposes for which the building is to be used, as to show clearly that they were designed to be permanent. Such, for instance, are the fixtures in a manufactory necessary for furnishing the motive power, or for the proper carrying on of the business.³ A mortgage of a machine-shop includes a lathe and other fixtures necessary for the prosecution of the business of the shop.⁴ A mortgage of a building erected for a steam saw-mill, and which would be of little use for any other purpose, embraces also the boilers, engines, saws, gearing and machinery necessary for the working of the mill and without which it would be incomplete.⁵ Boilers, engines, shafting, and steam-pipes for heating a large building, are covered by a mortgage of the realty.⁶

The principles by which to determine whether a personal arti-

¹ *Græme v. Cullen*, 23 Gratt. (Va.) 266; *Moore v. Valentine*, 77 N. C. 188.

² *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260; *Hill v. Wentworth*, 28 Vt. 428, per Bennett, J.; *Bishop v. Bishop*, 11 N. Y. 123, as to hop-poles; *Voorhees v. McGinnis*, 48 N. Y. 278; *Potter v. Cromwell*, 40 N. Y. 287; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Kelly v. Austin*, 46 Ill. 156; *Jones v. Ramsey*, 3 Bradw. (Ill.) 303; *Arnold v. Crowder*, 81 Ill. 56; *Taylor v. Collins* 51 Wis. 123; *Morris's App.* 88 Pa. St. 368; *Smith Paper Co. v. Servin*, 130 Mass. 511.

³ *Millikin v. Armstrong*, 17 Ind. 456; *Crane v. Brigham*, 3 Stockt. (N. J.) 29; *Keve v. Paxton*, 26 N. J. Eq. 107.

⁴ *Hoskin v. Woodward*, 45 Pa. St. 42.

⁵ *Brennan v. Whitaker*, 15 Ohio St. 446; *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260.

⁶ *Ex parte Montgomery, &c.* 4 Irish Ch. 520. In this case the Lord Chancellor said: "I find that all the cases come round to the same question, namely, what are fixtures? Now, it appears to me that this does not at all depend upon the power of removal; the owner in fee has the right to remove all fixtures; the tenant has a right to remove fixtures erected for trade purposes; but until they are severed they are still fixtures, and as between mortgagor and mortgagee they are not removable, though the mortgagor remain in possession. I therefore think that the possibility of removal is not so much the test as the nature of the article."

cle after being attached to the realty still remains a chattel are two : first, the mode and degree of the annexation ; and second, the purpose of it.¹ The first cannot of course be defined with any exactness. The modes of annexation may be almost as numerous as the instances that occur. The degrees of physical force with which the chattels are annexed may be as many as the modes of annexation. The degree may be very slight and yet be sufficient to make the article a fixture and part of the realty. As the result of the numerous cases, it is safe to say that this is the less important part of the criterion. If the intent is manifest that the chattel is attached to the estate for its permanent improvement, the mode and degree in which it is attached are of little importance. In a case before the English Court of Queen's Bench,² in regard to a hydraulic press placed in a factory but not essential to its work, Mr. Justice Mellor said : " If we could see, as in the gas-works case,³ an intention that the chattel should remain fixed to the factory so long as the factory remained a factory, then we might think the press to be sufficiently fixed to become a part of the freehold ; but we see no such intention."

The criterion adopted by several courts for determining whether property ordinarily regarded as personal becomes a part of the realty is the united application of the following requisites : 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold, — this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.⁴

It is in the application of the criterion that the courts chiefly differ. While some look to physical attachment to the realty as the chief requisite of a fixture, others regard chiefly the intention

¹ *Hellawell v. Eastwood*, 6 Exch. 295 ; *Central Nat. Bank of Troy*, 66 N. Y. 489, 496 ; *Quinby v. Manhattan Cloth & Paper Co.* 24 N. J. Eq. 260 ; *Blancke v. Rogers*, 26 N. J. Eq. 563 ; *Williamson v. N. J. Southern R. R. Co.* 29 N. J. Eq. 311, 329 ; *McMillan v. N. Y. Water Proof Paper Co.* 29 N. J. Eq. 610 ; *State Savings Bank v. Kercheval*, 65 Mo. 682.

² *Parsons v. Hind*, 14 W. R. 860.

³ *Reg. v. Lee*, L. R. 1 Q. B. 241 ; S. C. 14 W. R. 311.

⁴ So stated in *Teaff v. Hewitt*, 1 Ohio St. 511, 530, and expressly adopted in *Potter v. Cromwell*, 40 N. Y. 287 ; *McRea v.*

of the party making the annexation, and hence arises an irreconcilable conflict of authorities. The mode and degree of annexation may determine the intention. Especially is this the case when an article is attached so as to be an inseparable and permanent part of the realty. When the annexation is less complete, it may still afford convincing evidence of the intention ; as, for instance, where the building is constructed expressly to receive the machine or other article, and this could not be removed without material injury to the building, or where the article would be of no value for use in that particular building, or could not be removed without being destroyed or greatly damaged.¹

430. The fact that a mortgage enumerates some fixtures, but does not enumerate others which afterwards become the subject of dispute, affords reason to suppose that these were intentionally omitted in the mortgage deed, and did not pass by it ;² upon the principle "*Expressio unius est exclusio alterius.*"

431. The fact that a chattel has been mortgaged before it was attached to the realty seems to have been of weight in some cases, in leading to the determination that such mortgage carries the fixture as against a mortgage of the realty already existing ;³ and an agreement made by the mortgagor with a third person to whom the chattels belonged, that they should remain his after they are affixed to the realty until paid for, or that they should be subject until paid for to his right to remove them, has been held to have the same effect. In a case before the Court of Appeals of New York,⁴ it was held that such an agreement preserved the character of the chattels as personal property when they would otherwise have become fixtures so as to pass by a mortgage of the realty. But it was said that while there was no doubt that the owner of the land intended that the articles, which were an engine and boilers, should ultimately become a part of the realty, and be permanently affixed to it, yet this intention was subordinate to the prior intention expressed

¹ *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489.

² *Trappes v. Harter*, 2 C. & M. 153, 177.

³ *Eaves v. Estes*, 10 Kans. 314 ; *Tibbetts v. Moore*, 23 Cal. 208 ; and see *Ford v. Cobb*, 20 N. Y. 344 ; *Sheldon v. Edwards*, 35 N. Y. 279 ; *United States v. New Orleans Railroad*, 12 Wall. 362 ; *First Nat.*

Bank of Waterloo v. Elmore, 52 Iowa, 541.

⁴ *Tift v. Horton*, 53 N. Y. 377. This case is not entirely in accord with the case of *Voorhees v. McGinnis*, 48 N. Y. 278, which related to an engine and boilers which were covered by a chattel mortgage. It seems, however, that part of the articles had been attached to the realty before the execution of the chattel mortgage.

by the agreement, that the act of annexing them should not change their character as chattels until the price should be fully paid.

If the real estate is subject to a mortgage when chattels are annexed to it, which are not at the time subject to any personal mortgage, or to any equitable agreement for their subsequent removal, the chattels, if of the nature to become fixtures, become so immediately upon being attached to the land; and any chattel mortgage, or agreement that the articles should be considered personal property, will have no effect.¹ The chattels once having been annexed to the realty and become bound by a mortgage of the realty cannot be dissevered, except with the consent of the mortgagee.

In a case where machinery for a saw-mill was sold to the owner under a condition that it should remain the property of the vendor until paid for, and after a part of it had been set up in the mill a mortgage was made of the mill premises, the mortgagee having no notice of this agreement, it was held that the part of the machinery which had been put up in the mill passed by the mortgage; but that as to such of the machinery as was then lying in the mill yard the mortgagee gained no title as against the unpaid vendor.²

432. Hired fixtures. — It has been held, however, that boilers put into a steam mill, after the execution of a mortgage upon the mill, under an agreement with the mortgagor that he should have the use of them at a certain rental, and that they should remain the property of the person who put them in, and who should have the privilege of removing them at his pleasure, were not subject to the mortgage.³

In like manner machinery put into a mill subject to a mortgage, merely to exhibit it to the public by one not a party to the mortgage, is not covered by the mortgage.⁴ Although such machinery be afterwards bought by one of the mortgagors, if this be not done with the intent to use it in connection with the business carried on upon the premises, it does not then come within the operation of the mortgage.⁵

433. Buildings erected on the mortgaged premises by the

¹ *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157; *United States v. New Orleans Railroad*, 12 Wall. 362.

² *Davenport v. Shants*, 43 Vt. 546.

³ *Hill v. Sewald*, 53 Pa. St. 271.

⁴ *Stell v. Paschal*, 41 Tex. 640.

⁵ *Stell v. Paschal*, *supra*.

mortgagor are annexed to the freehold and cannot be removed by him, or by any one under his authority, while the debt remains unpaid.¹ When, however, the building is erected merely for temporary use, and it is apparent that there was an intention that it should not become attached to the land even so slightly as by the sinking into the soil of the blocks upon which it rested, the mortgagee of the land will acquire no interest in it, although placed there by the mortgagor. If erected by a firm of which the mortgagor is a member for purposes of trade, it is all the more clear that it was not intended as a permanent improvement, or to become a part of the realty.² But a building erected by the side of a mill for use as an office in connection with the mill was held to be a part of the realty, although intended to be temporary only, and to be ultimately removed, and not attached to the mill nor fixed to the ground, but resting upon wooden blocks upon the surface of the earth. The use for which the building was erected was regarded as determining its character as part of the realty.³

The owner of a lot of land having by parol license allowed a third person to erect a building upon it, afterwards made a mortgage of it to one who had no notice of such license. It was held that he was entitled to the building, and having entered into possession might maintain trespass against one removing it; and it was held, too, that the mere fact that the person who erected the building occupied it was no notice of his claim to it.⁴

A mortgage of a house passes the presses, cupboards, glazed doors, movable partitions, grates, ranges, and other like fixtures contained in it.⁵ It also passes the windows and blinds, though temporarily separated from the house; the door keys;⁶ a sun dial erected on a permanent foundation;⁷ a furnace so placed in a house that it cannot be removed without disturbing the brick-work of the house, and causing a portion of the ceiling to fall.⁸

¹ *Burnside v. Twitchell*, 43 N. H. 390; *Cole v. Stewart*, 11 Cush. (Mass.) 181; *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *Butler v. Page*, 7 Met. (Mass.) 40; *Sweetzer v. Jones*, 35 Vt. 317, per Kellogg, J.; *Frankland v. Moulton*, 5 Wis. 1; *New Orleans Nat. Bank v. Raymond*, 29 La. Ann. 355; *Matson v. Griffin*, 78 Ill. 477; *Dorr v. Dudderar*, 88 Ill. 107.

² *Kelly v. Austin*, 46 Ill. 156.

³ *State Savings Bank v. Kercheval*, 65 Mo. 682.

⁴ *Powers v. Dennison*, 30 Vt. 752.

⁵ *Longstaff v. Meagoe*, 2 Ad. & El. 167; *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76.

⁶ *Liford's case*, 11 Coke, 50.

⁷ *Snedeker v. Warring*, 12 N. Y. 170.

⁸ *Main v. Scharswaelder*, 4 E. D. Smith (N. Y.), 273.

Whether a portable furnace set in brick

Articles of furniture are not fixtures, though attached to the building. On this principle gas-fixtures adjusted to the gas-pipes do not pass with the realty.¹ Mantel mirrors hung upon hooks driven into the walls, and pier mirrors, though made to order for the house, and having cornices of the same design as those of the room and connected with them, but so attached that they can be removed and put into another house, are not covered by a mortgage of the realty.² A show case with drawers and sash though fastened in place by nails does not become part of the realty.³

A mortgage of a plantation will not cover the wagons and tools used upon it, or the stock and cattle, unless such property be expressly included in the mortgage.⁴ A mortgage of a tract of land does not include as a fixture a portable steam saw-mill, boiler and engine, which are not attached to the soil, but may be moved from place to place.⁵

Manure made in the ordinary course of husbandry upon a farm in possession of the mortgagor is so attached to the realty that, in the absence of any express stipulation to the contrary, it is considered a part of the realty, either as appurtenant to the freehold or as being in the nature of a fixture. The title to it is vested in the mortgagee, and the mortgagor has no right to remove it, and can give no title to it by sale.⁶

434. Trees and shrubs planted in a nursery garden, for the temporary purpose of cultivation and growth until they are fit for market, and then to be taken up and sold, pass by a mortgage of the land, so that neither the mortgagor nor his assignee or creditors can remove them as personal property.⁷ One claiming that trees and shrubs, whether growing naturally or planted and cultivated for any purpose, are not part of the realty, must show special circumstances which take the particular case out of the general rule; he must show that the parties intended that they should be regarded as personal chattels. The mere fact that the

is a part of the realty, is a question of fact, or of mixed law and fact. *Allen v. Mooney*, 130 Mass. 155; *Turner v. Wentworth*, 119 Mass. 459; *Towne v. Fiske*, 127 Mass. 125.

¹ *Shaw v. Lenke*, 1 Daly (N. Y.), 487; *McKeage v. Hanover F. Ins. Co.* 16 Hun (N. Y.), 289; S. C. 81 N. Y. 38.

² *McKeage v. Hanover F. Ins. Co. supra.*

³ *Cross v. Marston*, 17 Vt. 533.

⁴ *Vason v. Ball*, 56 Ga. 268.

⁵ *Taylor v. Watkins*, 62 Ind. 511.

⁶ *Chase v. Wingate*, 68 Me. 204; and see *Fay v. Muzzey*, 13 Gray (Mass.), 53; *Kittredge v. Woods*, 3 N. H. 503; *Norton v. Craig*, 68 Me. 275.

⁷ *Maples v. Millon*, 31 Conn. 598; *Adams v. Beadle*, 47 Iowa, 439. And see *Bank of Lansburgh v. Crary*, 1 Barb. (N. Y.) 542; *King v. Wilcomb*, 7 Ib. 263.

trees and shrubs were the stock in trade of the mortgagor in his business as a nursery gardener is insufficient for this purpose. They are *prima facie* parcel of the land itself, and would pass to a vendee upon a sale of the land unless specially excepted, and in the same way, unless excepted, pass to a mortgagee.¹ Although planted by the mortgagor after the execution of the mortgage, they become a part of the realty and part of the mortgage security.²

435. A fixture annexed to the land before the execution of the mortgage will pass by the mortgage without any special mention of the fixture, and even without any general description of it, or evidence of intention to include it, such as might be afforded as to machinery or other articles employed for manufacturing purposes by a special mention of a mill aside from the description of the land.³ This was the decision in an early case in Massachusetts,⁴ in which it was held that a kettle in a fulling mill set in brick-work, and used for dyeing cloth, passed by a mortgage of the land upon which the mill stood. The grounds of the decision were that this fixture could not be removed without actual injury to the mill; that it was essential to the use of the mill; and that being attached to it at the time of making the mortgage, it passed by it as part of the security:

As a general rule a mortgage of land passes the fixtures already upon it without any special mention being made of them. They pass with the estate and as a part of it. In a mortgage deed the premises were described as certain land "with the paper-mill, &c., thereon, and water privilege, appurtenances, &c., together with all its privileges and appurtenances." The machinery in controversy was fastened to the floor of the mill by means of iron bolts with nuts upon the ends of them. The machinery, however, could be removed without injury to the building, and might be used in other paper-mills. The machinery was subsequently attached by a creditor of the mortgagor, but it was held that it passed by the mortgage of the land and mill as a part of the realty.⁵

¹ Per Hinman, C. J., in *Maples v. Mil-
lon*, 31 Conn. 598.

² *Price v. Brayton*, 19 Iowa, 309.

³ *Clore v. Lambert*, 78 Ky. 224.

⁴ *Union Bank v. Emerson*, 15' Mass.
159. In *Hunt v. Mullanphy*, 1 Mo. 508,
a kettle annexed in a like manner to the

freehold was held not to be covered by
the mortgage, on the ground that it was
not permanently annexed.

⁵ *Lathrop v. Blake*, 3 Fost. (N. H.) 46;
Burnside v. Twitchell, 43 N. H. 390. In
Gale v. Ward, 14 Mass. 352, 356, the fact
that certain carding-machines could be

The intention of the parties to a purchase money mortgage, as regards fixtures, may be gathered from their intention in the other part of the transaction, namely, the sale of the property by the mortgagee to the mortgagor. Thus the owner of a twine factory, the land upon which it was situated, and the machinery in the mill, contracted to sell the whole for a gross sum, and executed a conveyance describing the land only and took back a mortgage with the same description. This was held to cover the machinery of the mill, on the ground that the parties manifestly intended the mortgage to cover the same property that passed by the deed.¹

But where upon the sale of a brewery a deed was given of the real estate and a separate bill of sale of the fixtures, and the vendor took a mortgage for a part of the purchase money, containing a description of the land alone, and the purchaser afterwards gave a mortgage of the fixtures mentioned in the bill of sale, it was held that the fixtures were not included in the mortgage of the land.² But if it appears that a manufacturing establishment was sold as a whole for a gross sum, the mere fact that a bill of sale was made of part of the fixtures does not change their character; but a mortgage of the land and improvements for the purchase money will cover whatever was a fixture to the realty.³

A mortgage of a mill passes the stones, tackling, and implements necessary for working it.⁴ A mortgage of a sugar-house carries with it an engine and machinery attached to it.⁵ Machinery set in bricks, and run by steam-power, for the purpose of manufacturing cotton-seed oil, constitutes a part of the realty and part of the security under a mortgage of the realty.⁶ A cotton-gin and press are fixtures and a part of the freehold, and are carried by a mortgage of it, whether erected before or after the mortgage.⁷ Platform scales fastened to sills laid upon a brick

removed from the mill without injury to it, and might be used in any other building erected for a similar purpose, was a reason for considering them personal property and not covered by a mortgage of the realty. A like view was taken in *Fullam v. Stearns*, 30 Vt. 443, in respect to a planing-machine, a circular saw and frame, and a boring machine.

See, on meaning of "appurtenances" in a chattel mortgage of a building, *Frey v. Drahos*, 6 Neb. 1.

¹ *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489.

² *Fortman v. Goepper*, 14 Ohio St. 558; *Zeller v. Adam*, 30 N. J. Eq. 421.

³ *Morris's App.* 88 Pa. St. 368.

⁴ *Place v. Fagg*, 4 Man. & R. 277.

⁵ *Citizens' Bank v. Knapp*, 22 La. Ann. 117.

⁶ *Theurer v. Nautre*, 23 La. Ann. 749.

⁷ *Bond v. Coke*, 71 N. C. 97; *Latham v. Blakely*, 70 N. C. 368; *Fairis v. Walker*, 1 Bailey (S. C.), 540.

wall set in the ground, intended for permanent use, are fixtures.¹

Of course, whenever it appears from the instrument itself that the parties did not intend that the machinery in the mill should be covered by the mortgage, it will not constitute a part of the mortgagee's security.²

436. Fixtures attached to the realty after the execution of a mortgage of it become a part of the mortgage security, if they are attached for the permanent improvement of the estate and not for a temporary purpose ;³ or if they are such as are regarded as permanent in their nature ;⁴ or if they are so fastened or attached to the realty that the removal of them would be an injury to it.⁵ The question whether fixtures annexed to the realty after a mortgage of it has already been executed become a part of it, and thus become also subject to the mortgage, is a different one in some respects from that which arises when the same fixtures are already attached to the realty when the mortgage is made. As to those articles which in their nature are such as to render it doubtful whether they should be properly classed as fixtures or not, the tendency of the decisions seems to be to require stronger evidence of intention that things annexed to the realty after the making of the mortgage are actually fixtures, and therefore form with the land one security, than is required when they are affixed before the making of the mortgage. The reason of this apparently is, that when the personal articles are already attached to the realty when the mortgage is taken, it is more likely that they entered into the consideration of the parties in estimating the value of the security, than it is when they are not attached to the realty and may never be.⁶ It is true that there may be in the taking of a mortgage before the fixtures are an-

¹ Arnold v. Crowder, 81 Ill. 56 ; Bliss v. Whitney, 9 Allen (Mass.), 114.

² Waterfall v. Penistone, 6 Ell. & Bl. 876 ; and see Begbie v. Fenwick, L. R. 8 Ch. App. 1075 ; S. C. 19 W. R. 402 ; Brown-on Fix. 3d ed. pp. 148, 149.

³ Winslow v. Merchants' Ins. Co. 4 Met. (Mass.) 306 ; Gardner v. Finley, 19 Barb. (N. Y.) 317 ; Roberts v. Dauphin Deposit Bank, 19 Pa. St. 71 ; Bond v. Coke, 71 N. C. 97 ; *Ex parte* Belcher, 4 Dea. & Chit. 703 ; Hubbard v. Bagshaw, 4 Sim. 326 ; *Ex parte* Reynal, 2 Mont.,

Dea. & De G. 443 ; Wood v. Whelen, 93 Ill. 153.

In a few cases considerable stress has been placed upon the fact that the personal chattels had already been mortgaged as personal before they were attached to the realty. Eaves v. Estes, 10 Kans. 314 ; Tibbetts v. Moore, 23 Cal. 208 ; Davenport v. Shants, 43 Vt. 546.

⁴ Coleman v. Stearns Manuf'g. Co. 38 Mich. 30.

⁵ Clore v. Lambert, 78 Ky. 224.

⁶ Clore v. Lambert, *supra*, approving text.

nexed an expectation of an increased value to arise from their being subsequently attached to the realty, as when a building has been erected for a certain purpose, and it is contemplated that the machinery or other articles adapted to be used in it will be placed in it; but it is evident that less reliance would be placed upon this expectation than upon the actual fact of the existence of the things upon the mortgaged estate. It does not follow, however, from the fact that the fixtures constituted no part of the mortgage security when it was taken, that they may therefore be removed without any wrong to the mortgagee. He is entitled to the benefit of any improvement of the property from whatever cause it may arise, just as he may suffer from a depreciation of it arising from accident or neglect, or from fluctuations in value due to general causes.¹

The track of a railroad laid upon mortgaged lands under an arrangement with the mortgagor, without condemnation under the right of eminent domain, is subject to the mortgage lien, and may be sold with the land under foreclosure proceedings.²

A mortgage by a gas company of its real estate with all the appurtenances thereto, its gas-mains, sewer-pipes, and meters, covers an enlargement of its works, and an extension of its mains and pipes.³ A mortgage by such company of its office furniture and fixtures covers additions made thereto from time to time as the necessities of the works required.⁴

Machinery or other property, when affixed to the realty, does not become subject to an existing mortgage of the realty unless it is affixed by the owner of the chattel or with his assent. Thus, if machinery belonging to a third person be put into a mill upon a written agreement that it is to remain subject to the order of such third person until it be paid for in full, the act of the mill owner in affixing the machinery to the mill is not sufficient to subject it to the operation of an existing mortgage. The owner of the machinery is not put upon inquiry as to the state of the title to the mill so as to be charged with constructive notice of the mortgage, and he does not assent to the affixing of the machinery to the realty absolutely, but only in a qualified way.⁵

But, on the other hand, it is held that an agreement between

¹ See *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71. 97 Mass. 279; *Meriam v. Brown*, 128 Mass. 391.

² *Price v. Weehawken Ferry Co.* 31 N. J. Eq. 31; *Hunt v. Bay State Iron Co.*

³ *Wood v. Whelen*, 93 Ill. 153.

⁴ *Wood v. Whelen*, *supra*.

⁵ *Cochran v. Flint*, 57 N. H. 514.

the seller and buyer of a boiler, placed in a machine-shop and so annexed to the realty as to become a part of it, that the boiler should remain the personal property of the seller until paid for, does not bind a subsequent mortgagee without notice.¹

437. An equitable mortgagee has the same right to hold fixtures as part of his security that a legal mortgagee has.² A woollen manufacturer mortgaged, by deposit of the title deeds, a piece of land, with a building upon it, and then built a mill upon the land and fitted it with a steam-engine and machinery necessary for his trade. Subsequently he assigned to another all the machinery and fixtures in the mill, and after this executed to the equitable mortgagee a legal mortgage of the estate. The Court of Queen's Bench held that all the machines which were fixed in a *quasi* permanent manner to the floor, roof, or side-walls, passed to the equitable mortgagee, but that those which were merely removable articles passed to the assignee under the bill of sale.³

438. If the mortgagee assent to an arrangement between the mortgagor and a mechanic, whereby the latter builds and sets up a machine upon the mortgaged premises, under a contract that the machine shall remain his property until paid for, or if the mortgagee, being in possession, treats it as personal property, and consents to its removal, a subsequent assignee of the mortgage cannot insist that under it he became the owner of the machine, as property annexed to the realty by the mortgagor. Such an agreement supersedes the general law as to fixtures between the mortgagor and mortgagee.⁴ And such is the case, also, where a person sets up a steam-engine and boiler upon land owned by another, under an agreement that he may remove them at any time, and afterwards takes a mortgage of the land from the owner of it. The engine and boiler never become the property of the mortgagor, or fixtures to the land, and therefore are not included in the mortgage.⁵

439. If fixtures be added to the property by a tenant at will of the mortgagor, after the mortgage, the right to remove them is determined by the rule which prevails as between mortgagor and mortgagee, and not that which prevails as between

¹ Southbridge Savings Bank v. Exeter Mach. Works, 127 Mass. 542.

² Williams v. Evans, 23 Beav. 239; *Ex parte* Astbury, L. R. 4 Ch. App. 630.

³ Longbottom v. Berry, L. R. 5 Q. B. 123; S. C. 39 L. J. (N. S.) Q. B. 87.

See, also, Tebb v. Hodge, 39 L. J. (N. S.) C. P. 56.

⁴ Bartholomew v. Hamilton, 105 Mass. 239; Frederick v. Devoil, 15 Ind. 357.

⁵ Taft v. Stetson, 117 Mass. 471.

landlord and tenant; and they cannot be removed without the consent of the mortgagee.¹ It does not avail the tenant that he annexed the fixtures under a special contract with the mortgagor,² or that the holder of the mortgage, who seeks to enforce his claim to the fixtures, took the assignment of the mortgage with notice of the tenant's claim.³ Where, during the pendency of a suit to foreclose a mortgage, a stranger, by permission of the mortgagor, erected a barn on the mortgaged premises, it was held that as against the mortgagee he had no right to remove it.⁴

A lessee who has erected a building upon mortgaged land, under an arrangement with the mortgagor by leasing the building of the mortgagee after the latter has purchased the mortgaged premises upon foreclosure sale, is estopped from setting up title thereto in himself.⁵

When permanent structures are erected by a lessee upon the mortgaged estate, the mortgagee's consent is necessary for their removal; but if they are erected for a temporary purpose, and with the intention of removing them, the lessee may remove them at any time during his term.⁶

A tenant's fixtures are not brought within a subsequent mortgage of the premises by his neglect to remove them on a renewal of his lease by a new landlord.⁷ Where one who has leased land to a firm buys out the right of one of the partners and afterwards gives a mortgage on the premises, the possession of the new firm is notice to the mortgagee that erections put up by the former firm are not covered by the mortgage because the other partners' rights cannot be taken away.⁸

If a lessee subsequently purchases the reversion of the premises, machinery and other fixtures set up by him become subject to an existing mortgage of the realty.⁹

If a lessee mortgages his leasehold estate, the same rules in relation to fixtures upon the estate apply as between him and his mortgagee that would apply if he owned the estate in fee.¹⁰

Trade fixtures set up by a partnership upon land owned by the

¹ *Lynde v. Rowe*, 12 Allen (Mass.), 100;
Clary v. Owen, 15 Gray (Mass.), 522;
Hunt v. Bay State Iron Co. 97 Mass.
279; *Day v. Perkins*, 2 Sandf. (N. Y.)
Ch. 359.

² *Clary v. Owen*; *supra*.

³ *Clary v. Owen*, *supra*.

⁴ *Preston v. Briggs*, 16 Vt. 124.

⁵ *Betts v. Wurth*, 32 N. J. Eq. 82.

⁶ *Kelly v. Austin*, 46 Ill. 156.

⁷ *Kerr v. Kingsbury*, 39 Mich. 150.

⁸ *Kerr v. Kingsbury*, *supra*.

⁹ *Jones v. Detroit Chair Co.* 38 Mich.
92.

¹⁰ *Ex parte Bentley*, 2 M., D. & De G.
591; *Ex parte Wilson*, 4 Dea. & Chit.
143; *S. C.* 2 Mont. & Ayr. 61; *Shuart v.*
Taylor, 7 How. (N. Y.) Pr. 251.

individual partners, which the partnership has no interest in beyond the use, do not become part of the realty, and may be removed by the partnership when its occupation of the premises ceases.¹

440. If a lessee mortgages tenant's fixtures, and afterwards surrenders his lease, the mortgagee has a right to enter and sever them. The surrender of the term does not operate to extinguish the right or interest already granted, but is subject to that interest, for the support of which the original term still continues. The mortgagee's right to sever the fixtures from the freehold is an interest of a peculiar nature, in many respects rather partaking of the character of a chattel than of an interest in real estate. "But we think," said Mr. Justice Williams, in a case before the English Court of Common Pleas,² "that it is so far connected with the land that it may be considered a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender."

441. It is a settled rule of law that fixtures annexed to the freehold by a tenant for the purposes of trade or manufacture may be removed by him at the expiration of his term, whenever the removal of them is not contrary to any prevailing practice, and the articles can be removed without causing material injury to the freehold.³ The purpose of this rule is to encourage the putting up of works beneficial to the public by persons whose tenure of the property is so short or so uncertain that they would not make the improvements or put in the machinery necessary for the profitable pursuit of their business, unless they had the right of removing these things at the termination of their tenancy. The reason of this rule does not apply when the fixtures are annexed by one who has, instead of the limited interest of a tenant, an unlimited ownership in fee; or an ownership which is qualified only by the condition of a mortgage upon the land which it is presumed he intends to fulfil, and which at any rate he would be estopped to say he did not intend to meet, and thus to keep the ownership of the land. Even after a forfeiture of the condition, he is allowed a considerable time within which to redeem, or else

¹ Robertson v. Corsett, 39 Mich. 777.

v. Harter, 3 Tyrw. 603; Coombs v. Beau-

² London & Westminster Loan and Discount Co. v. Drake, 6 C. B. N. S. 798.

mont, 5 B. & Ad. 72; Holbrook v. Chamberlin, 116 Mass. 155; Guthrie v. Jones, 108 Mass. 191; McConnell v. Blood, 123

³ Tyler on Fixtures, p. 267; Trappes Mass. 47.

obtain the full value of the land and of all the personal articles he has affixed to it by a sale of the whole interest upon foreclosure. In a recent case before the Court of Exchequer,¹ the question of the application of this rule, to the removal of a steam-engine and boiler used in a saw-mill upon the mortgaged premises before the execution of the mortgage, was fully discussed. It was found by the jury that these things were put up by the mortgagor not to improve the inheritance, but for the better use of the property, and that they could be removed without any appreciable damage to the freehold; but the court held that these findings were immaterial, because the right of the mortgagee attached by reason of the annexation to the land, and therefore that the intention of the mortgagor in respect of them could not prevail against the legal effect of the deed.

This case was carried by appeal to the Exchequer Chamber,² where the judgment of the court below and the law there declared were affirmed. Mr. Justice Willes, speaking of the reason why the engine and boiler, though they might have been removed by a tenant at the expiration of his term, yet could not be removed by a mortgagor, said: "And we are of opinion that the decisions which establish a tenant's right to remove trade fixtures do not apply as between mortgagor and mortgagee any more than between heir at law and executor. The irrelevancy of these decisions to cases where the conflicting parties are mortgagor and mortgagee was pointed out in *Walmsley v. Milne*,³ and we concur with the observations made in that case by the Court of Common Pleas." As illustrating this distinction and the reason of it, the

¹ *Climie v. Wood*, L. R. 3 Exch. 257. Kelly, C. B., delivering the judgment of the court, said: "It is a case between mortgagor and mortgagee, and no authority has been cited to show that a mortgagor is entitled to remove such trade fixtures. There have been several cases where the courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to show that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of the mortgage, or if the mortgagor in possession afterward annexed a fixture to it, that the fixture shall be deemed an addi-

tional security for the debt, whether it be a trade fixture or a fixture of any other kind. It has already been observed that no authority has been cited to show that trade fixtures may be removed by the mortgagor, but there are several to the contrary; and unless we are prepared to overrule them, our judgment must be adverse to the plaintiff."

To like effect see *Cullwick v. Swindell*, L. R. 3 Eq. Cas. 249, per Lord Romilly; *Ex parte Cotton*, 2 Mont., D. & De G. 725; *Hawtry v. Butlin*, L. R. 8 Q. B. 290; S. C. 21 W. R. 633; *Day v. Perkins*, 2 Sandf. (N. Y.) Ch. 359; *Maples v. Millon*, 31 Conn. 598.

² *Climie v. Wood*, L. R. 4 Exch. 328.

³ 7 C. B. N. S. 115.

learned judge quotes the language of Lord Cottenham, in a case before the House of Lords, where it was sought to extend the rule in regard to trade fixtures to a case arising between an heir at law and executor.¹

If the premises are mortgaged by the lessor during the existence of a tenancy, the mortgagee, or any one deriving title to the premises under the mortgage, occupies the position of the lessor towards the lessee; and the latter may remove in that case fixtures erected by him whenever he could do so as against his lessor.²

442. In Vermont the rule as to fixtures seems to be exceptionally strict in requiring that they shall in all cases be substantially attached to the freehold, and in holding that it is not sufficient to make personal chattels a part of the freehold that they are attached to the building in which they are used in a manner adapted to keep them steady, or that they are essential to the occupation of the building for the business carried on in it. "The rule requiring actual annexation," says Mr. Justice Bennett,³ "is not affected by those cases where a constructive annexation has been held sufficient. These cases may be regarded as exceptions to the general rule, or else as cases where the things were mere incidents to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture." It was moreover said that reference must be had not only to the

¹ *Fisher v. Dixon*, 12 Cl. & F. 312. "The principle upon which a departure has been made from the old rule of law in favor of trade appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land, and of the personal property which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was therefore not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favor of trade as applicable here, the whole being entirely under the con-

trol of the person who erected this machinery." To like effect Chief Justice Shaw, in a case before the Supreme Court of Massachusetts, *Winslow v. Merchants' Insurance Co.* 4 Met. (Mass.) 306, said: "The mortgagor, to most purposes, is regarded as the owner of the estate; indeed he is so regarded to all purposes, except so far as it is necessary to recognize the mortgagee as legal owner, for the purposes of his security. The improvements, therefore, which the mortgagor, remaining in the possession and enjoyment of the mortgaged premises, makes upon them, in contemplation of law he makes for himself, and to enhance the general value of the estate, and not for its temporary enjoyment."

² *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23.

³ *Hill v. Wentworth*, 28 Vt. 429.

annexation but also to the object and purpose of it; and that to change the nature and legal qualities of a chattel into a fixture requires not only a positive act on the part of the person making the annexation, but also that his intention to make this change should particularly appear; and that if this intention be left in doubt, the article should still be regarded as personal property. It was accordingly held in this case that in a mortgage of a mill for manufacturing paper, the iron shafting used to communicate the motive power to the machinery, and fastened to the building by means of bolts, should be regarded as a constituent part of the mill, and therefore as included in a mortgage of that; but that a large iron boiler supported by brick-work, laid on a stone foundation placed on the ground near the centre of the building, and also the machines for grinding rags into pulp, the paper presses, and other machinery, were no part of the real estate, as between the mortgagor and mortgagee.

This decision was followed by another to like effect in the same court, holding that while the steam-engine and boilers used in a marble mill were fixtures as between mortgagor and mortgagee, yet the saw frames, though fastened to the building by bolts, were not such fixtures. The manner in which they were attached to the building was not considered to be such as to operate to change their character as chattels.¹

443. Statutory provisions. — In Vermont it is provided by statute that machinery attached to or used in any shop, mill, printing-office, or factory, may be mortgaged by deed, executed, acknowledged, and recorded in the same manner as deeds of real estate; and shall have the same effect, and may be assigned, discharged, or foreclosed in the same manner.²

In Connecticut, it is provided that the fixtures of a manufacturing or mechanical establishment, or of a printing or publishing house, the furniture of a dwelling-house, and the hay in a barn, may be mortgaged with the realty when the mortgage contains a particular description of the machinery, furniture, or other property, to the same effect as if the same were a part of the real estate. The same may be mortgaged separate from the realty if particularly described, and the deed be executed, acknowledged, and recorded in all respects as a mortgage of land.³

¹ Sweetzer v. Jones, 35 Vt. 317; and see Fullam v. Stearns, 30 Vt. 443; Bartlett v. Wood, 32 Vt. 372.

² Gen Stat. p. 640, c. 108, §§ 5 & 6.

³ Gen. Stat. p. 481.

2. *Machinery in Mills.*

444. Intention. — A distinction is properly made between such fixtures in a mill as are indispensable to its use as a mill, and the movable machines used in it, which may be dispensed with upon a change in business to which the mill may be readily adapted.¹ Of the former class are such as are used for furnishing the motive power; and if the mill is adapted to one business only, the machinery necessary for that business may be included in the same class. Of the latter class are movable machines used in a mill adapted to various kinds of business, which may be wholly set aside, and still the value and usefulness of the mill property would not be materially impaired. Such machinery, not being indispensable to the enjoyment of the realty, is considered by some courts not to be a part of it, and not to pass by a mortgage of it.²

A mortgage was made of certain land, and the mills thereon.³ In the mills were various articles of machinery for carding, spinning, and preparing cotton yarn and cotton twine. These were subsequently seized upon an execution against the mortgagor, and were claimed as well by the mortgagee. It appeared that the machines might be easily removed without injury to them or to the building, and might be used for the same purpose in any other building.⁴ The court held that they were not properly fixtures, and therefore not subject to the mortgage. Under quite similar circumstances a mortgage of a woollen factory was held not to pass the looms used in it for the manufacture of broad-cloth, and merely fastened to the floor by screws to keep them in

¹ *Farrar v. Chauffetete*, 5 Den. (N. Y.) 527; *McConnell v. Blood*, 123 Mass. 47; *Smith Paper Co. v. Servin*, 130 Mass. 511; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Ferris v. Quimby*, 41 Mich. 202; *Shelton v. Ficklin*, 32 Gratt. (Va.) 727; *Morris's App.* 88 Pa. St. 368.

² *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Robertson v. Corsett*, 39 Mich. 777; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542; *McConnell v. Blood*, 123 Mass. 47; *Gale v. Ward*, 14 Mass. 352. In the latter case, Mr. Chief Justice Parker said the articles in controversy "must be considered as personal

property, because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes."

³ *Vanderpoel v. Van Allen*, 10 Barb. (N. Y.) 157. See, also, *Cresson v. Stout*, 17 Johns. (N. Y.) 116; *Potter v. Cromwell*, 40 N. Y. 287.

⁴ The highest authorities agree in holding that these facts alone should have little weight in deciding the question. See cases cited in this section, and *Walmsley v. Milne*, 7 C. B. N. S. 115, 118.

their places.¹ In these cases the intention was held to govern the character of the articles under consideration. It is to be observed, however, that other courts have decided cases quite similar, if not altogether like these cited from the New York reports, directly contrary to the decisions in these;² and it is to be further observed that the policy of the decisions in New York, Vermont, and Ohio, seems to be to favor treating machinery and like articles fixed to the realty as chattels.³ Other courts, for good reasons, hold such machinery to be fixtures, and to be covered by a mortgage of the realty without particular mention. Thus in a case recently decided in Iowa,⁴ the mortgage, after describing the land, upon which was situated a woollen manufactory filled with machinery for making cloth from wool, granted "all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining." Other mortgages were subsequently made which in terms covered the machinery, and upon a foreclosure of the former mortgage a contention arose in regard to the machinery of the mill. The court, after critically reviewing the cases, say: "It being conceded by all the cases that the engine, boiler, and attachments, being the motive power, are fixtures, and that the stones or burrs of a grist-mill, with the attachments, are likewise fixtures, it is not easy to understand why any dividing line should be made at the point where the belting attaches to the other machinery. Is there anything in the whole record of this case tending to show that the machinery in question was intended to be any less permanent than the engine, shafting, or belt? The fair presumption is, that the whole machinery, including that now in question, was placed in the building with the intention that it should remain there as part of the machinery until worn out or displaced by others. This assumption is as strong and controlling as to the carding-machines, spinning-jacks, *et cetera*, as it is as to the engine, shafting, and belts." Therefore the court conclude that all of the machinery which was propelled by the en-

¹ *Murdock v. Gifford*, 18 N. Y. 28. In the Supreme Court it was held that the mortgage carried the looms, on the ground that they were intended to be a permanent and essential part of the woollen factory. *Murdock v. Harris*, 20 Barb. (N. Y.) 407. See *McRea v. Central Nat.*

Bank of Troy, 66 N. Y. 489, for a review of the cases in New York.

² *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57.

³ See § 442; *Teaff v. Hewitt*, 1 Ohio St. 511.

⁴ *Ottumwa Woollen Mill Co. v. Hawley*, *supra*:

gine was part of the real estate, and passed by the foreclosure sale.¹

There is no certain criterion by which to determine in all cases what belongs to the one class and what to the other. Different courts decide differently in regard to the same articles; and even the decisions of the same court do not always seem to be perfectly consistent. The varying circumstances of the cases seem sometimes to have an immediate influence upon the determination of the courts, greater than the statement of them in the reports would seem to warrant. But in doubtful cases, where the mode and extent of the annexation of the chattels to the realty do not determine their character as fixtures, the intention with which they were put upon the estate, whether for permanent use or for a temporary purpose, comes in with a controlling influence to settle the doubt.² This intention is to be gathered not merely or chiefly from the manner in which the chattels are annexed to the realty, but from the character of the improvement, whether it is essential to the proper use of the realty.³

445. A mortgagee of the realty may have priority of a chattel mortgagee of the fixtures. In a late case in Massachusetts the right to certain machinery in a building used as a machine-shop was contested between a mortgagee of the real estate, and a mortgagee of the machinery described as personal property.⁴ Before either of the mortgages was made the mortgagor owned the machine-shop, and also the machinery, and used both for manufacturing purposes. It was held that such machines and their appurtenances as were specially adapted to be used in the shop and were annexed to it passed by the mortgage of the real estate. In this class were included punches, polishing frames, vibrators, a polisher and fan-blower, the pulleys, shafting, and hangers. These were bolted or screwed to the floors or timbers of the building, although it appeared that they could be re-

¹ To like effect see *Parsons v. Copeland*, 38 Me. 537; *Harlan v. Harlan*, 15 Pa. St. 507; *Teaff v. Hewitt*, 1 Ohio St. 511.

² *Kelly v. Austin*, 46 Ill. 156, per Walker, J.; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *McRea v. Central Nat. Bank of Troy*, 66 N. Y. 489; *Morris's App.* 88 Pa. St. 368; *Smith Paper Co. v. Servin*, 130 Mass. 511.

³ *Green v. Phillips*, 26 Gratt. (Va.)

752; *Shelton v. Ficklin*, 32 Gratt. (Va.) 727.

⁴ *Pierce v. George*, 108 Mass. 78; and see, also, *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *McConnell v. Blood*, 123 Mass. 47; *Allen v. Woodard*, 125 Mass. 400; *Parsons v. Copeland*, 38 Me. 537; *Richardson v. Copeland*, 6 Gray (Mass.), 536; *Millikin v. Armstrong*, 17 Ind. 456; *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541.

moved without substantial injury to it. The wheels belonging to the polishing machines were placed in the same class, although they could be detached and removed without injury. But other articles not appearing to be essential parts of the shop, and not attached to it, were held not to pass by the mortgage of the real property but by the mortgage of the personalty. Of these articles not considered fixtures in any sense of the word were the lathes fastened to a bench by screws, and operated by a foot movement; grindstones resting upon frames standing upon the floor; a rattler and frame, tack machines, the splitter, the anvils, the vises, the lathes, and a portable forge.

In a case in Ohio a similar question arose between the holder of a chattel mortgage of the fixtures and a mortgagee of the realty in respect to the boilers, engines, saws, and gearing of a steam saw-mill.¹ The chattel mortgage was made before the articles were annexed to the property, but it recited that they were designed to be used in the mortgagor's saw-mill, and power was given the mortgagees to take possession of them upon default, whether they should be attached to the freehold and in law become a part of the realty or not. The mortgage of the real estate was afterwards taken without notice of this agreement. The record of the chattel mortgage was constructive notice only of an incumbrance upon chattels; but when the mortgage of the real estate was made, these things were not chattels, but real estate, and the record of the mortgage as a chattel mortgage was no notice to the mortgagee of the realty. The court declared that it devolved upon the mortgagee of the chattels, who sought to change the legal character of the property after it was annexed to the realty, and to create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance; or, otherwise, take the risk of its loss in case it should be sold and conveyed as part of the real estate of a purchaser without notice.² As against a mortgagee of

¹ *Brennan v. Whitaker*, 15 Ohio St. 446. For a similar case with like decision, see *Frankland v. Moulton*, 5 Wis. 1. See, also, *Fortman v. Goepper*, 14 Ohio St. 558; *Voorhees v. McGinnis*, 48 N. Y. 278.

² Per White, J., in *Brennan v. Whitaker*, *supra*. He dissents from the ruling

in *Ford v. Cobb*, 20 N. Y. 344, where it was held that an agreement evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land without notice; and cites to the contrary *Richardson v. Copeland*, 6 Gray (Mass.), 536, and other cases.

the realty to sustain a claim to the fixtures, there must be either an actual severance of them previously made, or actual notice of the agreement by the mortgagor that they should be severed.

446. A steam-engine and boiler, with the appurtenances belonging to them, used for furnishing the motive power of a mill, together with the shafts and pulleys connected with the engine, are fixtures, and pass to a mortgagee of the realty.¹ The machinery of the motive power, whether a steam-engine or a water-wheel, and all the shafting and other means of communicating this power, are as a general rule fixtures.² A steam-engine and boilers fixed in a mill by the mortgagor after the execution of the mortgage become subject to it.³ It is not material that they are the property of another, as, for instance, that they were leased to the mortgagor, if he annexes them to the freehold with the consent of the owner.⁴ But if the land and the engine are held by different titles, the latter does not necessarily become part of the realty when set up and used by one who does not own the land.⁵ Even if they were subject at the time to a chattel mortgage, this would not hold against the mortgage of the realty after they are attached to it.⁶ Nor does it make any difference that although erected in a permanent manner they can be removed without injury to the building in which they are placed or with which they are connected.⁷ A mortgage of a factory by a lessee passes to the mortgagee a steam-engine used in it, although the lessor could not claim it.⁸

447. Various articles of machinery. — A shingle-machine put into a mill by a mortgagor becomes a part of the mort-

¹ *In re M'Kibben*, 4 Ir. Ch. (N. S.) 520; *Hubbard v. Bagshaw*, 4 Sim. 326; *Harris v. Haynes*, 34 Vt. 220; *Sweetzer v. Jones*, 35 Vt. 317; *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57; *Quinby v. Manhattan Cloth and Paper Co.* 24 N. J. Eq. 260; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Watson v. Watson Manufacturing Co.* 30 N. J. Eq. 483; *Coleman v. Stearns Manuf'g. Co.* 38 Mich. 30; *Taylor v. Collins*, 51 Wis. 123; *Southbridge Sav. Bank v. Exeter Machine Works*, 127 Mass. 542.

² *Hill v. Wentworth*, 28 Vt. 428; *Keve v. Paxton*, 26 N. J. Eq. 107; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Powell v. Monson & Brimfield Manuf'g. Co.* 3 Mason, 459; *McConnell v. Blood*, 123 Mass. 47.

³ *Winslow v. Merchants' Ins. Co.* 4 Met. (Mass.) 306; *McKim v. Mason*, 3 Md. Ch. Dec. 186; *Rice v. Adams*, 4 Harr. (Del.) 332. See when may be removed, *Randolph v. Gwynne*, 7 N. J. Eq. (3 Hals.) 88.

⁴ *Fryatt v. Sullivan Co.* 5 Hill (N. Y.), 116; and see *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

⁵ *Robertson v. Corsett*, 39 Mich. 777.

⁶ *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278.

⁷ *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Voorhees v. McGinnis*, *supra*.

⁸ *Day v. Perkins*, 2 Sandf. (N. Y.) Ch. 359.

gage security.¹ Mill-saws attached to a saw-mill and used in it become a part of the realty, and subject to a mortgage of the mill previously made.² Heavy machinery for making paper, fastened to a building or to its foundations, is regarded as fixtures.³ So also a machine for turning kegs, a machine for jointing staves, and a machine for cutting staves, were held to pass by a mortgage of a keg factory in which they were used, and to which they were attached.⁴ But, on the other hand, a planing and matching machine, and a machine for making mouldings, used in a sash and blind factory, were held not to pass by a mortgage of the realty.⁵ And so machines used in a shoe-shop, although attached to the building by nails or bolts, are not covered by a mortgage of the realty.⁶ To constitute such machines fixtures, they must be actually annexed to the freehold in such a way as to evince an intention of making them a permanent accession to the freehold.⁷

448. Looms in a mill. — In the English courts there have been several cases involving the determination of the question whether looms in a mill pass by a mortgage of it in which they are not particularly named.⁸ A mortgage was made of a mill "with the warehouse, counting-house, engine-house, boiler-house, weaving-shed, wash-house, gas-works, and reservoirs belonging, adjoining, or near thereto, and also the steam-engine, shafting, going-gear, machinery, and all other fixtures whatever," affixed to the land and premises. The assignees in bankruptcy of the mortgagor took possession of and sold, among other things, a large

¹ *Corliss v. McLagin*, 29 Me. 115. In *Trull v. Fuller*, 28 Me. 545, the owner of a saw-mill made a mortgage of a clap-board-machine and shingle-machine set up in the saw-mill and used there, which was recorded as a personal mortgage. Subsequently a creditor of the mortgagor levied an execution upon the land and mill, and it was held that these machines passed to a purchaser of the real estate under the execution as parcel of the realty. But in *Wells v. Maples*, 15 Hun (N. Y.), 90, a shingle-machine not fastened to the building, except so far as necessary to keep it in place, was held not to be covered by a mortgage of the realty.

² *Burnside v. Twitchell*, 43 N. H. 390; *Johnston v. Morrow*, 60 Mo. 339; *Robertson v. Corsett*, 39 Mich. 777; *Cole-*

man v. Stearns Manufacturing Co. 68 Mich. 30.

³ *Quinby v. Manhattan Cloth and Paper Co.* 24 N. J. Eq. 260; *Fish v. N. Y. Water Proof Paper Co.* 29 N. J. Eq. 16; *Hill v. Farmers' & Merchants' Nat. Bank*, 97 U. S. 450; S. C. 8 Cent. L. J. 175.

⁴ *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58; and see *Snedeker v. Warring*, 12 N. Y. 170, 174; *Walker v. Sherman*, 20 Wend. (N. Y.) 636, 639.

⁵ *Rogers v. Brokaw*, 25 N. J. Eq. 496; and see *Wells v. Maples*, 15 Hun (N. Y.), 90.

⁶ *McConnell v. Blood*, 123 Mass. 47.

⁷ *Blanche v. Rogers*, 26 N. J. Eq. 563.

⁸ *Holland v. Hodgson*, L. R. 7 C. P. 328; S. C. 41 L. J. C. P. N. S. 146; 20 W. R. 990. For American cases see § 444.

number of looms that were in the mill. Each loom rested upon four feet, and was attached to the floor by means of a wooden plug driven through each foot. The mortgagee claimed the looms as part of his security, and the Court of Common Pleas gave judgment in his favor, and this was affirmed by the Court of Exchequer Chamber.¹

449. Cotton looms. — Under a mortgage of a mill for the manufacture of cotton cloth, with the appurtenances, “together with the steam-engines, boilers, shafting, piping, mill-gearing, gasometers, gas-pipes, drums, wheels, and all and singular other the machines, fixtures, and effects fixed up in or attached or be-

¹ In the latter court Mr. Justice Blackburn said: “Since the decision of this court in *Climie v. Wood*, L. R. 3 Exch. 257, and on appeal, L. R. 4 Exch. 328, it must be considered as settled law (except perhaps in the House of Lords), that what are commonly known as trade or tenant’s fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right as against the freeholder to sever the fixtures from the land; yet, if he be a mortgagor in fee, has no right as against his mortgagee. . . . It was admitted, and we think properly admitted, that where there is a conveyance of the land the fixtures are transferred, not as fixtures, but as a part of the land, and the deed of transfer does not require registration as a bill of sale.”

The learned judge further says that it has been contended, and justly, that *Hel-lawell v. Eastwood*, 6 Exch. 295, is very like the present case, with this exception: that there the tenant had a limited interest only, whereas here he has the fee; and if that case should apply to this case, it would follow (but for that exception, perhaps) that the looms which were in question remained chattels. But that case was decided in 1851. In 1853, the Court of Queen’s Bench had, in *Wiltshire v. Cottrell*, 1 E. & B. 674, to consider what articles passed by the conveyance in fee of a farm; and there the court decided that a certain threshing-machine inside a barn, fixed by screws and bolts to four posts which were let into the earth, passed

by the conveyance. It seems difficult to point out how the threshing-machine in that case was more for the improvement of the inheritance of the farm than the looms in the present case were for the improvement of the manufactory. Then there was the case of *Mather v. Fraser*, 2 Kay & J. 536, in 1856, and that of *Walmsley v. Milne*, 7 C. B. N. S. 115, in 1859, in which similar decisions to that in *Wiltshire v. Cottrell* were given. These cases “seem authorities for this principle, — that when an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the article is to enhance the value of the premises to which it is annexed, for the purposes to which those premises are applied. The threshing-machine in *Wiltshire v. Cottrell* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same way as the hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not as much affixed to the mill as an adjunct to it, and to improve the usefulness of the mill as such, as either the threshing-machine or the hay-cutter.” In conclusion, he says it is of great importance that the law as to what is the security of a mortgage should be settled, and that these decisions should not be reversed unless clearly wrong.

longing to the said mill or factory, buildings, or premises," the question arose, upon a subsequent sale of the estate under a power of sale contained in the mortgage, whether a large number of looms for weaving cotton yarn into cloth, and which were set into the floors without any fastening, passed by mortgage, and by the subsequent sale. Lord Romilly, giving the decision of the Court of Chancery,¹ said: "My opinion is, that those words mean that the mill and everything that properly belongs to the mill is the thing that is mortgaged. I do not think that the furniture of the mill does properly belong to the mill; it is liable to be changed from time to time. . . . I do not doubt that looms are machinery in one sense; but the question is, are they, properly speaking, machinery belonging to the mill? In one sense, no doubt, they belong to the mill, because they are put into the mill; but I read those words as 'belonging essentially to the mill,' and forming necessarily a part of it, whatever may be the purpose to which the mill may be applied. To whatever purpose the mill may be applied, the steam-power, the gas-lighting, and the like, do form a part of it; but the others do not, being merely accidental, and no more form a part of the mill than a carpet forms part of a house. If a house and all the things belonging to the house were assigned, that would not necessarily include the furniture unless it was so specified. . . . I am clear the looms are not fixtures in any proper sense of the term."²

In like manner, in a recent case in New Jersey, it was held that spinning-frames, twisting-frames, and like machinery, though fastened to the floor by nails or screws, or held in position by cleats, are personal property, and pass under a chattel mortgage as against a mortgage of the realty subsequently given; but that the steam-engine, boilers, shafting, belting, couplings and pulleys used to communicate the power, the water-wheels and water-wheel governors, the gas-generator and gas-pump connected with it, the gas-pipes and burners, and the steam-heating pipes, whether laid on hooks along the walls or resting on the floor, are parts of the mill and pass by the mortgage of the realty as against a prior chattel mortgage.³

450. Machinery of a silk-mill. — A silk manufacturer mortgaged certain land, "also all that silk-mill there erected or in

¹ *Hutchinson v. Kay* 23 Beav. 413; see, also, *McKim v. Mason*, 3 Md. Ch. Dec. 186, relating to machinery for the manufacture of cotton goods. See § 444.

² Not in accord with §§ 443, 450.

³ *Keeler v. Keeler*, 31 N. J. Eq. 181.

the course of erection, and all other buildings then or thereafter to be erected thereon; and also all those the steam-engine or steam-engines, boilers, steam-pipes, main shafting, mill-gearing, millwright's work, and all other machinery and fixtures whatsoever there erected or set up, or to be thereafter, &c., upon the said plat of land, mill, and premises, with the appurtenances."¹ A second mortgage was made more comprehensive in terms, and the first mortgagee having sold the property under an order of court, the question arose upon a claim by the second mortgagee whether the spinning-mills and other machinery passed under the first mortgage. The Master of the Rolls held that only such machinery passed by the mortgage under the words "other machinery" as was of the same nature with the articles specified in the enumeration previously made, and that therefore only the machinery used for the purpose of giving power to the mill was included in the mortgage. On appeal, however, it was decided that all the machinery placed in the mill, whether for creating power or for being moved, was included in the mortgage. "It seems rather improbable," said Lord Chancellor Campbell, "that the parties should have contemplated such a damaging disruption of the machinery as must take place if the mortgagees, in seeking to make good their security, must tear in pieces the machinery in the mill, removing and selling one half of it, which would be comparatively of little value without the other half." . . . He concurs with the Vice-Chancellor Page Wood, in his general view of the law upon this subject in *Mather v. Fraser*,² and is of opinion that, according to the true construction of the mortgage deed, all the disputed articles are included in the mortgage to the defendants.

451. A mortgage of an iron rolling-mill was held to pass the entire set of rolls used in the mill, whether in place and fixed for use or temporarily detached.³ The rolls, being adapted to the manufacture of bars of different shapes and sizes, cannot all be used at once; but they are equally a part of the mill when unfixed to give place to others. "Duplicates necessary and proper for an emergency," said Chief Justice Gibson, "consequently follow the realty, on the principle by which duplicate keys of a

¹ *Haley v. Hammersley*, 3 De Gex, F. & J. 587; S. C. 9 W. R. 562.

² *Voorhis v. Freeman*, 2 Watts & S. (Penn.) 116.

³ 2 K. & J. 536.

banking-house or the toll-dishes of a mill follow it." A similar decision was made in a recent case in England.¹

In the same case it was held that the straightening plates embedded in the floor were also fixtures, but that the weighing machines were not.

3. *Rolling Stock of Railways.*

452. Whether the rolling stock and fixtures of a railroad are personal property, or are in some sense fixtures, and therefore pass by a mortgage of the realty, is a question that has been much discussed, and the decisions are conflicting. On the one hand it is said that railway cars are a necessary part of the entire establishment; that their wheels are fitted to the rails; that they are peculiarly adapted to the use of the railway, and cannot be used for any other purpose; and that they are necessary incidents of the real estate in a mortgage of it. In an early case before the Supreme Court of New York, it was decided that rolling stock was to be deemed fixtures.² But the Court of Appeals several years

¹ *Ex parte Astbury*, L. R. 4 Ch. App. 630. Mr. Justice Giffard, giving the opinion, said: "There appear to be connected with rolling machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not now speaking of rolls which can be considered as in any sense unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. . . . The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term 'belonging to the machine as part of it.' Dictum of Lord Cottenham in *Fisher v. Dixon*, 12 Cl. & F. 312. Then comes the case as to the different sizes of

rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size. . . . But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it."

² *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484. Mr. Justice Strong, delivering the opinion of the court, said: "The property of a railway company consists mainly of the road-bed, the rails upon it, the depot erections, and the rolling stock, and the franchises to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depots, are clearly real property. That the locomotives and passenger, baggage, and freight cars are a part, and a necessary part, of the entire establishment, there can be no doubt. Are they so permanently and inseparably connected with the more substantial realty as to become constructively fixtures? . . . It may be that if an appeal should be made to the

afterwards established the doctrine in this state to be that rolling stock is personal in its character, and that a mortgage of it must be recorded as a chattel mortgage.¹ And finally, in 1868 it was provided by statute that a mortgage executed by a railroad company shall be effectual as to personal property covered by it, if recorded as a mortgage of real estate, without filing it as a chattel mortgage.²

A like confusion and contradiction of authority upon this subject, and a like final settlement of it by legislation, is to be found in many states.³ As a summary of the adjudications upon this subject it may be said that, while there are many and strong arguments for holding that rolling stock is part of the realty of a railroad,⁴ — and this view seems to have the support of the United

common sense of the community, it would be determined that the term fixtures could not well be applied to such movable carriages as railway cars. But such cars move no more rapidly than do pigeons from a dove-cote or fish in a pond, both of which are annexed to the realty."

This decision was followed by *Stevens v. Buffalo & N. Y. City R. R. Co.* 31 Ib. 590, and *Beardsley v. Ontario Bank*, Ib. 619, holding that rolling stock is personalty, and a mortgage of it subject to the Chattel Mortgage Act. A few years later the same court held that a mortgage of a railroad need not be recorded as a chattel mortgage, in order to bind the rolling stock. *Bement v. Plattsburgh & Montreal R. R. Co.* 47 Ib. 104; S. C. 51 Ib. 45.

¹ *Hoyle v. Plattsburgh & Montreal R. R. Co.* 54 N. Y. 314; *Randall v. Elwell*, 22 N. Y. 521.

² 2 R. S. 1875, p. 555, § 115.

³ *California*: Such mortgages are recorded in the office of the county recorder, where mortgages of real estate are recorded, but in books kept for personal mortgages. Civil Code, §§ 2955, 2959, 2961. *Connecticut*: Recorded in office of secretary of state. Acts 1877, c. 38. *Dakota T.*: Recorded as real estate mortgage in the office of register of deeds for the county. R. C. 1877, p. 304. *Florida*: Rolling stock declared fixtures, and mortgage recorded in office of secretary of state. Acts 1874, c. 1987. *Iowa*: Rolling stock regarded as fixtures, and mort-

gage recorded in office of the county recorder. Code, 1873, §§ 1284, 1285. *Minnesota*: Rolling stock part of the realty, and mortgages of recorded in the registry of deeds. *Montana T.*: Mortgages of recorded as mortgages of real estate. Laws 1873, p. 102. *New Jersey*: Recorded as mortgages of real estate. R. S. 1877, p. 924, § 82. *Ohio*: Recorded in registry of deeds as a real estate mortgage. R. S. 1860, p. 322. *Vermont*: Recorded in office of county clerk of each county through which the road passes. G. S. 1870, c. 28, §§ 100-102. *West Virginia*: Recorded in county registry. Act April 13, 1873. *Wisconsin*: Rolling stock declared fixtures, and recorded in office of secretary of state. Laws 1872, c. 119, §§ 39, 40; Laws 1877, c. 144, § 1.

Rolling stock is declared personal property, and subject to execution as such, by provisions of the constitutions of *Illinois*, Const. 1870, art. xi. § 10; *Missouri*, Const. 1875, art. xii. § 16; *Arkansas*, Const. 1874, art. xvii. § 11; *Nebraska*, Const. 1875, art. xi. § 2; *Texas*, Const. 1876, art. x. § 4; *West Virginia*, Const. 1872, art. xi. § 8.

⁴ *Palmer v. Forbes*, 23 Ill. 301; *Hunt v. Bullock*, 23 Ill. 320; *Titus v. Mabey*, 25 Ill. 257; *Youngman v. Elmira & Williamsport R. R. Co.* 65 Pa. St. 278; *Covey v. Pittsburgh, Fort Wayne & Chicago R. R. Co.* 3 Phila. (Pa.) 173; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Douglas v. Cline*, 12 Bush (Ky.), 608, 630; *State v. Northern Cent. R. R. Co.* 18 Md.

States courts,¹—the weight of authority in the state courts seems to be against that position.²

4. Remedies for Removal of Fixtures.

453. The mortgagee may follow and take fixtures covered by a mortgage of the realty, and improperly removed, wherever he can find them.³ The mortgagor himself can of course gain no right to hold them as against the mortgagee. A purchaser from the mortgagor has no such right, because he is affected with knowledge of the existing lien, and as against the mortgagee, his purchase is therefore fraudulent and void. "Even without knowledge of the mortgage," says Chief Justice Lowrie, of Pennsylvania,⁴ "it is hard to see how a purchaser could be relieved from this responsibility; for all purchasers, hirers, and renters are bound to ascertain, or take the risk of assuming, the title of their vendors and lessors. But may not a mortgagor sell in the usual way the lumber, firewood, coal, ore, or grain found growing on the land, without violating the rights of the mortgagee? Yes, he may, until the mortgagee stops him by ejectment or estoppel, for those things are usually intended for consumption and sale, and the sale of them is the usual way of raising the money to pay the mortgage. But in the case of a factory or other building it is from the use of it as it is, and not by its consumption or its sale by piecemeal, that all its profits are to be derived."

The mortgagee's right of action is based upon his general legal ownership under his mortgage, or upon his actual or constructive possession at the time of severance.⁵ The mortgagee, having the legal title to the property, may maintain replevin for fixtures removed from the realty. If after the foreclosure of a mortgage

193; *Morrill v. Noyes*, 56 Me. 458; *Pierce v. Emery*, 32 N. H. 484; *Meyer v. Johnston*, 53 Ala. 237, 332.

¹ *Pennock v. Coe*, 23 How. 117; *Galveston R. R. Co. v. Cowdrey*, 11 Wall. 459; *Dunham v. Cincinnati, Peru & C. Ry. Co.* 1 Wall. 254; *Minnesota Co. v. St. Paul Co.* 2 Wall. 609, note, p. 648; *S. C.* 6 Ib. 742; *Farmers' Loan & Trust Co. v. St. Joseph & Denver City Ry. Co.* 3 Dill. 412; *Scott v. Clinton & Springfield R. R. Co.* 6 Biss. 529; *Pullan v. Cincinnati & Chicago R. R. Co.* 4 Biss. 35.

² *Williamson v. N. J. Southern R. R. Co.* 29 N. J. Eq. 311; *Coe v. Columbus, Piqua & Ind. R. R. Co.* 10 Ohio St. 372; *Boston, Concord & Montreal R. R. Co. v. Gilmore*, 37 N. H. 410.

This subject, imperfectly presented here, is fully discussed in *Jones on Railroad Securities*, §§ 146-187.

³ See §§ 687, 688.

⁴ *Hoskin v. Woodward*, 45 Pa. St. 42.

⁵ § 688; *Gooding v. Shea*, 103 Mass. 360.

the mortgagor wrongfully remove a house from the land, the purchaser having the legal title may maintain replevin for it.¹

It is held, however, under a different view of the nature of a mortgage, that when a fixture, as, for instance, a house, annexed to the real estate by the mortgagor, is afterwards, before the foreclosure of the mortgage, by him removed from the premises and sold, although it was part of the mortgaged premises, the mortgagee cannot recover it from the purchaser; that by the removal he has lost his right to the property, though he might still have a cause of action for the waste.² But justice would seem to demand, and authority supports this position, that one purchasing what he either actually or constructively knows to be mortgaged to another shall not be allowed to shelter himself behind his wrongful act, and say that thereby the nature of the property was changed. The remedy of the mortgagee in some states is not at law but in equity; not replevin to recover the property severed, but generally injunction to restrain the commission of waste.³

Even in New Jersey, where the mortgagee is regarded as having the legal title for the purpose of asserting and maintaining his possession, he is not allowed to maintain replevin for fixtures wrongfully removed; ⁴ but he may maintain an action on the case for the injury to the security.⁵

454. The mortgagee, by virtue of his interest in the property, may maintain an action against the mortgagor for removing fixtures, and thereby causing substantial and permanent injury and depreciation to the mortgaged estate. The owner of the equity has no more right than a stranger to impair the security of the mortgage. The damages are measured by the extent of the injury, and not by the insufficiency of the remaining security. The mortgagee is not obliged to apply in the first place the property that remains at any valuation whatever. "He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt."⁶

¹ *Matzon v. Griffin*, 78 Ill. 477; § 688.

⁵ *Jackson v. Turrell*, 39 N. J. L. 329.

² *Clark v. Reyburn*, 1 Kans. 281; *Harris v. Bannon*, 78 Ky. 568. To like effect see *Citizens' Bank v. Knapp*, 22 La. Ann. 117; *Buckout v. Swift*, 27 Cal. 433; *Woehler v. Endter*, 46 Wis. 301; S. C. 8 Cent. L. J. 325.

³ *Vanderslice v. Knapp*, 20 Kans. 647.

⁴ *Kircher v. Schalk*, 39 N. J. L. 335. See § 688.

⁶ *Byrom v. Chapin*, 113 Mass. 308. Otherwise where a mortgage is regarded as a mere lien and not a title to the land. There the insufficiency of the security must be shown. *Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213.

But a different rule of damages prevails in states where a mortgage is regarded as merely an equitable conveyance to secure the debt. In those states it necessarily follows that an action by a mortgagee for any injury to the premises must be based not upon the injury to the premises, in which he has only an equitable interest, but upon the loss occasioned to him by impairing his security. The measure of his damages is therefore limited to the loss he may sustain upon his security.¹ Under this rule the action must rest upon proof that, before the alleged injury, the mortgaged premises were of sufficient value to pay the plaintiff's mortgage, or a part of it, and that, by reason of such injury, they became inadequate for that purpose.² This is the rule in New York and New Jersey.³

¹ Van Pelt v. McGraw, 4 N. Y. 110; Schalk v. Kingsley, 42 N. J. L. 32.

In the New York case the court said: "This action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be."

² Schalk v. Kingsley, 42 N. J. L. 32, 36, per Van Syckel, J.

³ In Schalk v. Kingsley, *supra*, the supreme court discussing these different rules of damages, their adaptation to the nature of the mortgagee's estate, and the practical results produced by each, say: "There is much force in the Massachusetts view, that the mortgagee is entitled to be protected in the enjoyment of the security for which he contracted, however ample it may be, and the wrong-doer himself ought not to complain if he is compelled to restore what he unlawfully removed. Especially would this be so in the case of a mortgage maturing at a remote future period, when the real value of the premises would depend upon contingencies which might not be foreseen. But while injustice may in some cases be done by rejecting this rule, it is not in harmony with the nature of the mortgagee's estate, and its adoption in practice would lead to many difficulties. In Massachusetts, by force and effect of the mort-

gage, and as between the parties to the mortgage, the right of possession also passes immediately to the mortgagee and carries with it the incidents of a right to sue in trespass for any injury to the freehold. There it may be a necessary logical sequence that in an action at law, the damages, which represent the injury to the premises, must go to the owner of the legal estate.

"The objections to the Massachusetts rule are obvious, and are not met, in my judgment, by the court in Gooding v. Shea, before cited. Such litigation would frequently result to the benefit of the mortgagor, by whose consent the wrong was committed, by operating as a satisfaction of the mortgage when the premises were still ample to satisfy the mortgage debt. A more serious objection would exist in the fact that the action would be maintainable for every slight injury to the freehold. The person who purchased and removed a stick of timber or a cord of wood, or the mechanic who tore down an old building preparatory to the erection of a new one, or who made any alteration in the structures upon the premises which might be deemed in any degree detrimental to their value, would be amenable to suit. But admitting that the third mortgagee may sue and recover for the entire injury to the premises, how shall the damages be appropriated, and how would the wrong-doer be shielded from further recovery by the first and

When such injury has been done there can be but one recovery for it, and a reasonable satisfaction made in good faith to a prior mortgagee bars an action by a subsequent mortgagee.¹ If after the removal of the fixtures, and before the mortgagee brings an action of trespass to recover their value, he sells the mortgaged premises under a power of sale, and receives therefrom more than enough to pay his claim and all prior incumbrances, this fact may be shown in mitigation of his claim for damages.² But upon the question whether the injury had been settled and satisfied by payment to the first mortgagee, evidence is admissible to show that the articles removed were of greater value than the sum so paid, and that the damage done to the premises by their removal was greater than the value of the articles so removed.³

In Wisconsin it is held the mortgagee after a decree of foreclosure may maintain an action for an injury done the mortgaged premises, either by the mortgagor or by a stranger, provided the security be thereby impaired and the mortgagor be insolvent.⁴

A mortgagee may recover the value of fixtures wrongfully removed from the mortgaged premises, although since such removal

second mortgagees? The prior mortgagees could not be made parties to such suit, and they would not be bound by the verdict as to the amount of damages found in favor of the third mortgagee; and, in our practice, there is no method in which the injury to each mortgagee could be ascertained, and the distribution properly made. In fact, the rule repels the idea of distribution, for it is based upon the notion that the mortgagees plaintiff is entitled to the entire damage done to the lands. A rule which would subject a defendant to pay to each of several mortgagees the full amount of damage which he had committed upon the premises would unhesitatingly be condemned.

"It is therefore suggested, in the Massachusetts cases, that but one recovery would be allowed, and that would afterwards be appropriated under the direction of the court. Aside from the entire absence of any recognized procedure in our courts of law by which the several parties in interest could be bound by the verdict, and by which an appropriation could be made, such a course would manifestly be mere circumlocution, leading to the prac-

tical adoption of the other rule; for, in the end, the distribution would necessarily be made upon the basis of the actual loss to each mortgagee.

"All these difficulties will be obviated by adopting the injury to the security as the basis of damages. Under that rule, no suit can be maintained unless the plaintiff sustains a substantial injury; and each mortgagee in turn may, without reference to the other, recover such damage as he can show he has sustained on his part.

"The action must rest upon proof that, before the alleged injury, the mortgaged premises were of sufficient value to pay the plaintiff's mortgage or a part of it, and that, by reason of such injury, they became inadequate for that purpose. In that view the extent of the loss can be approximately computed. This, in my opinion, is the better rule, and one which, in its practical application, will not be attended with any serious difficulty."

¹ Byrom v. Chapin, *supra*.

² King v. Bangs, 120 Mass. 514.

³ Byrom v. Chapin, *supra*.

⁴ Jones v. Costigan, 12 Wis. 677.

of them the property has been sold under a power in his mortgage, and he has himself purchased it at a price sufficient to satisfy his claim. His title is sufficient to sustain a cause of action.¹

455. A mortgagee not having possession, or the right of possession, cannot maintain an action of tort in the nature of trespass *quare clausum fregit* against a stranger for breaking and entering the mortgaged premises and removing fixtures. But the right to recover damages for the value of the fixtures is separable from that to recover for "breach to the close."² The right of present possession only affects the form of action. The right to recover depends upon the title, and not upon possession or the right of possession. In an action of tort for forcibly entering the house and removing fixtures, the mortgagee, even before condition broken, may recover the full amount of damage done to the estate by the removal, without regard to the sufficiency of his security. Until the whole debt be paid, he cannot be deprived of any substantial part of his entire security without full redress therefor. "As the injury affects the estate, it may be sued for directly by any one in whom the legal interest is vested. A second or third mortgagee, though not in possession, has a sufficient interest in the estate to maintain an action for such an injury. Although it is true that a stranger may thus be liable to either of the several mortgagees, as well as to the mortgagor, it does not follow that he is liable to all successively. The superior right is in the party having superiority of title. But the defendant can resist neither, by merely showing that another may also sue or has sued. If he would defeat the claim of either, he must show that another having a superior right has appropriated the avails of the claim to himself. The demand is not personal to either mortgagee, but arises out of and pertains to the estate; and, when recovered, applies in payment, *pro tanto*, of the mortgage debt, and thus ultimately for the benefit of the mortgagor, if he redeems."³

The mortgagee, even before entering into possession, can maintain an action against the mortgagor, or any other person who severs and removes from the mortgaged estate any articles which have been annexed to and made part of it. It makes no difference as against the mortgagee that the fixtures are severed by

¹ *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58.

² Per Wells, J., in *Gooding v. Shea*, 103 Mass. 360. In New Jersey the action is

³ *Gooding v. Shea*, 103 Mass. 360; upon the case. *Jackson v. Turrell*, 39 N. Page v. Robinson, 10 Cush. (Mass.) 99; J. L. 329.

Woodman v. Francis, 14 Allen (Mass.) 198.

accident. Therefore if a building be partly destroyed by fire, the mortgagor has no right to sell such parts of it as are saved; and he cannot maintain an action for the price of such articles if the value of the land is less than the amount of the mortgage debt, and the mortgagee has entered for breach of the condition and forbidden the payment to the mortgagor.¹

Where the mortgagee has no right to enter and the mortgagor can be deprived of possession only by a foreclosure and sale, he may retain possession after the sale until the delivery of the deed to the purchaser; but if he remove fixtures in the mean time, the purchaser may recover them by an action of replevin. The purchaser's deed takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor.²

A mortgagee not in actual possession and who has not entered to foreclose cannot maintain trespass against the owner of the equity of redemption for cutting grass on the land, as the owner has a right to take every annual crop.³ But if the property detached from the realty be fixtures subject as part of the realty to a mortgage, the mortgagee, whether in possession of the premises or not, may sue for the recovery of the things themselves in an action of replevin;⁴ or may sue in trespass for damage done the freehold; or he may, in an action of trover, recover their value.⁵ A tort-feasor has no right to complain of the form of the remedy.

¹ *Wilmarth v. Bancroft*, 10 Allen (Mass.), 348.

² *Woodward v. Pickett*, 8 Gray (Mass.), 617.

³ *Sands v. Pfeiffer*, 10 Cal. 258. See, however, §§ 453, 694, and *Alexander v. Shonyo*, 20 Kans. 705; *Vanderslice v. Knapp*, 20 Kans. 647.

⁴ *Lafin v. Griffiths*, 35 Barb. (N. Y.) 58.

⁵ *Hitchman v. Walton*, 4 M. & W. 409; *Holland v. Hodgson*, L. R. 7 C. P. 328.

CHAPTER XII.

REGISTRATION AS AFFECTING PRIORITY.

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| I. Nature and application of registry acts, 456-479. | IV. Requisites as to the time and manner of recording, 542-549. |
| II. Registry acts of the several states, 480-526. | V. Errors in the record, 550-556. |
| III. Requisites as to execution and acknowledgment, 527-541. | VI. The effect of a record duly made, 557-569. |

1. *Nature and Application of Registry Acts.*

456. In general. — In this country a mortgage, like any other conveyance of real estate, is subject to registry laws, by which its priority depends for the most part upon the priority of its registration. These laws in substance provide for the recording of all deeds properly executed which affect titles to real property, and establish priority of title under that conveyance which is first recorded, although another conveyance may have been first executed.

Every subsequent purchaser is bound to take notice of a deed in the line of title previously recorded, although he had no actual notice of it. If he has relied upon the representations of his grantor in regard to the title to the premises without consulting the record, which is always open to his inspection, he has done so at his peril; although he may in such case be an innocent purchaser in fact, he is not regarded as such in law.¹

Systems of registration of land titles more or less complete have for a long time prevailed in Germany, France, and Scotland, and perhaps in other European states. Yet no general system of registration has ever been adopted in England.² In America, however, registry laws were enacted in the several colonies very soon after their settlement. In Massachusetts, as early as 1641, "for the avoiding of fraudulent conveyances, and that every man may know what estate or interest other men may

¹ *Buchanan v. International Bank*, 78 Ill. 500. ² See § 570.

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have in any houses, lands, or other hereditaments they are to deal in," it was enacted that "no mortgage, bargain, sale, or grant made of any houses or lands, rents, or other hereditaments, where the grantor remains in possession, shall be of any force against other persons except the grantor and his heirs, unless the same be acknowledged before some magistrate, and recorded." In the Plymouth Colony, conveyances of land, including mortgages, were required to be recorded by a law enacted five years before that of Massachusetts Bay.

457. Title deeds. — The English law in regard to the possession of title deeds has generally no application in this country, on account of the prevalence here of a general system of registry. Under the registry laws, the record being notice to all the world, it is not necessary that the mortgagee should have possession of the title papers.¹ Without the protection of such laws, the possession of the title deeds becomes an important badge of title; and it is said that the old rule in English chancery was that if a person took a mortgage and voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee without notice, to whom the title deeds were delivered; but the later English doctrine is, that the mere circumstance of leaving the title deeds with the mortgagor is not, of itself, sufficient to produce this result. There must be something like a voluntary and unwarrantable concurrence of the first mortgagee in the mortgagor's retaining the title deeds, so that he really concurs in a fraud, or is grossly negligent, to defeat his mortgage.²

458. A mortgagee of real estate is a purchaser within the meaning of the recording laws. This is declared by statute in some states, and in others it is a rule of judicial construction.³ "When I speak of a purchaser for a valuable consideration," says Lord Hardwicke, "I include a mortgagee, for he is a purchaser *pro tanto*."⁴ A trustee in a deed of trust is also a purchaser for value. He occupies the same ground with respect to

¹ Evans v. Jones, 1 Yeates (Pa.), 172; Miller, 130 Mass. 289; Jordan v. McNeil, 174. 25 Kans. 459; Whelan v. McCreary, 64

² Berry v. Mutual Ins. Co. 2 Johns. (N. Y.) Ch. 603. Ala. 319.

³ Haynsworth v. Bischoff, 6 S. C. 159; Bass v. Wheelless, 2 Tenn. Ch. 531; Patton v. Eberhart, 52 Iowa, 67; Moore v. Walker, 3 Lea (Tenn.), 656; Weinberg v. Rempe, 15 W. Va. 829; Chapman v. 542.

⁴ In Willoughby v. Willoughby, 1 T. R. 763; and see Porter v. Green, 4 Iowa, 571; Seever v. Delashmutt, 11 Iowa, 174; Salter v. Baker, 54 Cal. 140; Singer Manufacturing Co. v. Chalmers, 2 Utah,

notice, either actual or constructive, of any outstanding equities, that a mortgagee does.¹

But a distinction is taken by some courts between a mortgage given to secure a preëxisting debt, and one upon which the consideration is paid at the time of its execution. The former, although given upon a valid consideration as between the parties, is not regarded as a purchase for a valuable consideration which will entitle the mortgagee to protection against prior equities, although he had no notice of them when he took the mortgage.² He must have parted with some value or some right upon the faith of the mortgage and at the time of it, to entitle him to protection as a purchaser. He must have received some new consideration, or must have relinquished some security for a preëxisting debt due him.³

But a mortgage to secure an antecedent debt is perfectly valid as between the parties, whatever may be its effect as to purchasers or incumbrancers.⁴ Moreover such a mortgage, if taken without notice of one given to secure a future indebtedness, has precedence of it, if it be first recorded.⁵

¹ *New Orleans Canal & Banking Co. v. Montgomery*, 95 U. S. 16; *Kesner v. Trigg*, 98 U. S. 50.

² *New Jersey*: *Pancoast v. Duval*, 26 N. J. Eq. 445; *Mingus v. Condit*, 23 Ib. 313; *Morse v. Godfrey*, 3 Story, 364, 389. *Alabama*: *Gafford v. Stearns*, 51 Ala. 434; *Short v. Battle*, 52 Ala. 456; *Alexander v. Caldwell*, 55 Ala. 517; *Coleman v. Smith*, 55 Ala. 368; *Cook v. Parham*, 63 Ala. 456; *Thurman v. Stoddard*, 63 Ala. 336. *South Carolina*: *Zorn v. R. R. Co.* 5 S. C. 90. *New York*: *Manhattan Co. v. Evertson*, 6 Paige, 457; *Van Heusen v. Radcliff*, 17 N. Y. 580, 584; *Cary v. White*, 7 Lans. 1; S. C. 52 N. Y. 138; *Weaver v. Barden*, 49 Ib. 286; *Padgett v. Lawrence*, 10 Paige, 170, 180; *Stalker v. M'Donald*, 6 Hill, 93; *Dickerson v. Tillinghast*, 4 Paige, 215; *Coddington v. Bay*, 20 Johns. 637; *Westervelt v. Haff*, 2 Sandf. Ch. 98; *Union Dime Savings Inst. v. Duryea*, 67 N. Y. 84; *De Lancey v. Stearns*, 66 N. Y. 157.

The same rule was laid down in *Illinois* in the case of *Metropolitan Bank v. Godfrey*, 23 Ill. 579. In later cases, however, it has been held, so far as negotiable paper is concerned, that an indorsee taking it before maturity as payment or security for

a preëxisting debt is a holder for value, and takes it free from latent defences on the part of the maker. *Doolittle v. Cook*, 75 Ill. 354; *Manning v. McClure*, 36 Ill. 490. In the latter case Mr. Justice Lawrence, referring to *Metropolitan Bank v. Godfrey*, *supra*, said: "We do not desire to be understood as overruling that position; but if that question comes again before us, it will be open to argument whether a different principle should be applied to conveyances of real estate from that which all the members of the court agree should be applied to the indorsement of a promissory note."

³ *Spurlock v. Sullivan*, 36 Tex. 511; *Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 211; and see *Lawrence v. Clark*, 36 N. Y. 128; *Schumpert v. Dillard*, 55 Miss. 348; *Hinds v. Pugh*, 48 Miss. 268, 272; *Perkins v. Swank*, 43 Miss. 349, 360; *Wilson v. Knight*, 59 Ala. 172; *Bartlett v. Varner*, 56 Ala. 580; *Withers v. Little*, 56 Cal. 370.

⁴ *Steiner v. McCall*, 61 Ala. 406; *Turner v. McFee*, 61 Ala. 468.

⁵ *National Bank v. Whitney*, 103 U. S. 99.

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The mortgagee for an antecedent debt acquires a lien upon the property to the extent only of the mortgagor's equitable interest at the time. Thus if the mortgagor has then contracted to sell the land, and the vendee has paid a portion of the purchase money, the mortgage is a lien only to the extent of the unpaid purchase money upon such contract. But after the vendee has received notice of the mortgage, he cannot make a valid payment of the remainder of the purchase money.¹

This rule requiring the payment of an actual consideration at the time of the transaction to constitute a *bond fide* purchaser, within the meaning of the recording acts, does not apply to any one but the original purchaser. He being protected by the recording acts from a prior unrecorded conveyance, any one who takes an assignment from him is entitled to the same protection, although the assignee parts with no valuable consideration for the assignment, and even though he has actual notice of the prior unrecorded conveyance.²

If the sole consideration of a conveyance be the love and affection of the grantor, it will not hold against a prior unrecorded mortgage of the same property; or against a mortgage imperfectly recorded.³

But numerous authorities hold that a mortgagee who has taken his mortgage in good faith to secure a preëxisting debt is entitled to be regarded as a purchaser, and to be protected as such.⁴ The weight of authority, however, seems to be against this position.

459. The giving of further time for the payment of an existing debt, by a valid agreement, for any period however short, is a valuable consideration, and is sufficient to support a mortgage as a purchase for a valuable consideration.⁵ But the mere taking of collateral security on time is not by itself, and in the absence of any agreement beyond it, an extension of the time of payment of the original debt; and therefore a mortgage taken as security in such way is not a purchase for value.⁶

460. A judgment creditor is not a purchaser within the re-

¹ Young v. Guy, 23 Hun (N. Y.), 1.

² Webster v. Van Steenberg, 46 Barb. N. Y. 211; Wood v. Chapin, 13 N. Y. 509.

³ Aubuchon v. Bender, 44 Mo. 560; Bishop v. Schneider, 46 Mo. 472.

⁴ Babcock v. Jordan, 24 Ind. 14, and cases cited.

⁵ Hale v. Omaha Nat. Bank, 33 N. Y.

Superior Ct. 40; Gilchrist v. Gough, 63 Ind. 576; S. C. 19 Alb. L. J. 276; Schumpert v. Dillard, 55 Miss. 348; Port v. Embree, 54 Iowa 14; Cook v. Parham, 63 Ala. 456; Thames v. Rembert, 63 Ala. 561.

⁶ Cary v. White, 52 N. Y. 138, revers-

ording acts of some states. He was not regarded as a purchaser at common law. In a case in *Peere Williams*, "it was granted," said the reporter, "that if Lord Winchelsea, the covenantor, had made a mortgage of the premises for a valuable consideration and without notice, such mortgagee, in regard that he might have pleaded his mortgage, and would have been as a purchaser without notice, should have held place against the intended purchaser, for then the money would have been lent on the title and credit of the land, and would have attached on the land; which would not be so in the case of a judgment creditor, who, for ought that appears, might have taken out execution against the person or goods of the party that gave the judgment; and a judgment is a general security, not a specific lien on the land."¹ And in another case given by the same reporter it was said, that "one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither *jus in re* nor *ad rem*."² The recording acts do not necessarily change the common law in this respect, unless they in terms interpose to protect a judgment lien; and where they do not it stands, as at common law, subject to the prior conveyance.³ If there be an existing mortgage at the time the judgment is rendered, that will bind only the equity of redemption whether the mortgage be recorded or not, or whether the judgment creditor had or had not actual notice of the mortgage when he obtained the judgment.⁴ An attachment of land upon the debt of one holding the record title does not avail at all against the equitable owner of the estate, or against one claiming under a mortgage or deed not recorded.⁵ There is no appreciable distinction between an attachment and a levy of an execution or a judgment lien, except that which results from the amount of expense incurred in the latter proceedings, and such expense cannot be regarded as placing the creditor in the situation of a *bond fide* purchaser.⁶ Whether the lien be by attachment or by judgment, it is a lien only upon the real estate, or the interest in it owned by the debtor, not upon

ing 7 *Lans. (N. Y.)* 1; *Wood v. Robinson*, 22 *N. Y.* 564; the *dictum* in the case of *Pratt v. Coman*, 37 *N. Y.* 440, to the contrary, is denied in *Cary v. White*, *supra*. See, also, cases cited in the last case.

¹ *Finch v. Winchelsea*, 1 *P. Wms.* 277.

² *Brace v. Marlborough*, 2 *P. Wms.* 491.

³ *Cover v. Black*, 1 *Pa. St.* 493, per Chief Justice Gibson; *Rodgers v. Gibson*, 4 *Yeates (Pa.)*, 111; *Heister v. Fortner*, 2 *Binn. (Pa.)* 40.

⁴ *Knell v. Green St. Building Ass'n*, 34 *Md.* 67.

⁵ *Hackett v. Callender*, 32 *Vt.* 97.

⁶ *Hart v. Farmers' & Mechanics' Bank*, 33 *Vt.* 252.

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that owned by another, as is the case when the debtor has conveyed it or mortgaged it, although the deed be unrecorded. The creditor is entitled to the same rights as the debtor had, and to no more.¹

461. A mortgage recorded prior to an entry of judgment which is a lien upon the property takes precedence of the judgment lien;² and a mortgage recorded prior to an attachment is superior to the attachment lien, although the order for attachment be in the sheriff's hands at the time, but it be not actually made.³ And so if a creditor have actual notice of a prior unrecorded mortgage at the time of obtaining his judgment lien,⁴ or before the debt was contracted,⁵ he will hold his lien subject to such mortgage. A mortgage executed and recorded after a judgment is entered against the mortgagor is of course subject to the judgment lien.⁶ As between a mortgage and a judgment rendered in a county different from that in which the land is, priority is determined by priority of registration in the county where the land is situate.⁷ A mortgage and a judgment entered of record on the same day, the record not showing which was first recorded, are payable *pro rata*.⁸ Under a statute which provides that a mortgage recorded within a certain time after its date shall take effect as between the parties from its date, a judgment recovered subsequently to the date of a mortgage, and before the recording of it, binds only the equity of redemption, and is subject to the mortgage without regard to the question of actual notice, if the mortgage is subsequently recorded within the time prescribed by law.⁹

462. An unrecorded mortgage is preferred to a judgment where a judgment creditor is not considered a purchaser within the recording acts; for a judgment lien or attachment is not protected by them; and a mortgage being valid without being recorded, for all purposes except that of preserving its lien against

¹ Norton v. Williams, 9 Iowa, 528.

² Jackson v. Dubois, 4 Johns. (N. Y.) 216; Scott v. M'Murran, 7 Blackf. (Ind.) 284; Dunwell v. Bidwell, 8 Minn. 34; Wertz's Appeal, 65 Pa. St. 306; Tarver v. Ellison, 57 Ga. 54; Goodenough v. McCoid, 44 Iowa, 659.

³ Gray v. Patton, 13 Bush (Ky.), 625.

⁴ Williams v. Tatnall, 29 Ill. 553; Thomas v. Vanlien, 28 Cal. 616; and see Cheesebrough v. Millard, 1 Johns. (N. Y.)

Ch. 409; Mead v. N. Y., Housatonic & Northern R. R. Co. 45 Conn. 199.

⁵ Britton's Appeal, 45 Pa. St. 172; Lahr's App. 90 Pa. St. 507.

⁶ Tarver v. Ellison, 57 Ga. 54.

⁷ Firebaugh v. Ward, 51 Tex. 409.

⁸ Hendrickson's Appeal, 24 Pa. St. 363.

⁹ Knell v. Green St. Building Ass'n, 34 Md. 67.

bonâ fide purchasers and mortgagees, is valid against a judgment lien.¹ In such case it makes no difference that the mortgage was given to secure future advances, which had not been made when the judgment was rendered.² Lands omitted from a mortgage by mistake may be regarded as conveyed by an unrecorded mortgage so far as a subsequent judgment is concerned; and the lien of the judgment will be subject to the equity of the mortgage.³ This decision is based upon a statute which is held to accord priority only to a lien evidenced by some instrument "required to be recorded."

Generally, knowledge on the part of a judgment or attaching creditor of an unrecorded mortgage upon the debtor's property affects him as it would a purchaser; that is, the notice is equivalent to a record of the mortgage.⁴ Although the creditor has notice of the mortgage, a purchaser at the sale upon execution is not affected by it, and being without notice himself, he acquires a title superior to the unrecorded mortgage.⁵ And, on the other hand, a judgment creditor having gained priority over an unrecorded mortgage, a purchaser at the execution sale obtains the same priority, notwithstanding he has notice of the mortgage.⁶

The lien of a mortgage unrecorded at the date of a judgment, but recorded before the sale upon an execution thereon, is prior to the lien of the judgment, and the purchaser buys with constructive notice of the mortgage.⁷ But where a statute provides that a mortgage shall not be a lien upon the property until it shall have been recorded, then the doctrine of notice, it has been held, does not apply to a creditor, but to purchasers only.⁸

¹ *Burgh v. Francis*, 1 Eq. Cas. Abr. 320, pl. 1; *Finch v. Winchelsea*, 1 P. Wms. 277; *Burn v. Burn*, 3 Ves. 582; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Schmidt v. Hoyt*, 1 Edw. (N. Y.) 652; *Pixley v. Huggins*, 15 Cal. 127; *Orth v. Jennings*, 8 Blackf. (Ind.) 420; *Greenleaf v. Edes*, 2 Minn. 264; *Kelly v. Mills*, 41 Miss. 267; *First Nat. Bank of Tama City v. Hayzlett*, 40 Iowa, 659; *Hoy v. Allen*, 27 Iowa, 208; *Churchill v. Morse*, 23 Iowa, 229; *Welton v. Tizzard*, 15 Iowa, 495; *Bell v. Evans*, 10 Iowa, 353; *Evans v. McGlasson*, 18 Iowa, 150; *Norton v. Williams*, 9 Iowa, 528; *Patterson v. Linder*, 14 Iowa, 414; *Righter v. Forrester*, 11 Bush (Ky.), 278; *Morton v. Robards*, 4 Dana (Ky.), 258; *Holden v.*

Garrett, 23 Kans. 98, where the subject is quite fully considered.

² *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268.

³ *Galway v. Malchow*, 7 Neb. 285.

⁴ *Mead v. N. Y., Housatonic & Northern R. R. Co.* 45 Conn. 199; *Priest v. Rice*, 1 Pick. (Mass.) 164.

⁵ *Miles v. King*, 5 S. C. 146.

⁶ *Smith v. Jordan*, 25 Ga. 687.

⁷ *Holden v. Garrett*, 23 Kans. 98, which see for a full discussion of the subject.

⁸ *Hulings v. Guthrie*, 4 Pa. St. 123; *Jaques v. Weeks*, 7 Watts (Pa.), 261. These cases seem to be overruled in *Solms v. McCulloch*, 5 Pa. St. 473; but the authority of the latter case is questioned in *Uhler v. Hutchinson*, 23 Pa. St.

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463. But, on the other hand, in many states it is held that the lien of a judgment or attachment is superior to an unrecorded mortgage, or to a recorded mortgage which is defectively executed, in the absence of actual notice of the mortgage on the part of the judgment or attaching creditor, or of the execution purchaser.¹

In many states the statutes in terms provide that unrecorded conveyances shall be void as to creditors, or subsequent incumbrancers; or provide that they shall not be valid against other persons than the grantors, their heirs and devisees, and persons having actual notice.²

In Ohio, inasmuch as the statute declares that mortgages shall take effect only from the time they are left for record, a judgment recovered after the date of a mortgage, and before it is recorded, takes precedence of it.³ Yet, in this state, a judgment creditor is not a purchaser, nor is he in any way entitled to the privileges of that position.⁴

If a mortgage of land lying in two counties be recorded in but one, a foreclosure sale passes the land in both, as against a purchaser under a judgment docketed in the county where the mortgage was not recorded subsequently to the foreclosure proceedings. The want of registration does not disable the debtor from disposing of the property by a valid conveyance before the judgment lien attaches; nor does it prevent the court, in a proceeding to which the debtor is a party, from transferring it by a judicial sale.⁵

464. A mortgage given at the time of the purchase of real estate, to secure the payment of purchase money, has preference over all judgments and other debts of the mortgagor, to the extent of the land purchased. It is so provided by statute

110; *Davis v. Ownsby*, 14 Mo. 170; *Holden v. Garrett*, 23 Kans. 98.

¹ *Van Thorniley v. Peters*, 26 Ohio St. 471; *Mayham v. Coombs*, 14 Ohio, 428; *White v. Denman*, 16 Ohio, 59; 1 Ohio St. 110; *Fosdick v. Barr*, 3 Ib. 471; *Holliday v. Franklin Bank*, 16 Ohio, 533; *Sharp v. Shea*, 32 N. J. Eq. 65; *Hulings v. Guthrie*, 4 Pa. St. 123; *Hibberd v. Bovier*, 1 Grant (Pa.) Cas. 266; *Uhler v. Hutchinson*, 23 Pa. St. 110; *Barker v. Bell*, 37 Ala. 354; *Moor v. Watson*, 1 Root (Conn.), 388; *Reichert v. McClure*, 23 Ill. 516; *Hoag v. Sayre* 33 N. J. Eq.

552; *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. R. Co.* 58 Miss. 846; *Moore v. Davey*, 1 N. Mexico, 303; *Ludlow v. Clinton Line R. R. Co.* 1 Filippin 25.

² Statutes quoted. See §§ 461-466; *Gallagher v. Galletley*, 128 Mass. 367.

³ *Mayham v. Coombs*, 14 Ohio, 428. Under a statute of the State of Kansas, quite similar in effect, the Supreme Court of the latter state took a different view. *Holden v. Garrett*, 23 Kans. 98.

⁴ *Tonsley v. Tonsley*, 5 Ohio St. 78.

⁵ *King v. Portis*, 81 N. C. 382.

in several states.¹ A purchase money mortgage is good and effectual against the wife of the mortgagor, without her joining in the execution of it. The seisin of the husband is instantaneous only; and it is a well settled rule that in such case no estate or interest can intervene.² This rule applies even where the mortgage is made to a third person,³ who as part of the same transaction advances the purchase money. Dower attaches as against every one but the mortgagee and his assigns.⁴ A homestead exemption cannot be set up against a mortgage for the purchase money,⁵ or even against a mortgage to secure money borrowed with which to pay the purchase price when such mortgage is executed simultaneously with the deed of purchase.⁶

465. A mortgage for purchase money, to be entitled to preference, must be executed simultaneously with the deed of conveyance from the vendor. If an interval of time is left between the two transactions, during which the interest of the purchaser is liable to be seized on execution upon the judgment, this preference is lost, and the judgment is entitled to priority.⁷ If the instruments are delivered at the same time, it does not matter that they were executed on different days, because they take effect only from the delivery.⁸ The provision that a mortgage from a purchaser to a vendor, delivered simultaneously with the deed, to secure the purchase money, shall be preferred to a previous judgment against the vendee, does not imply that in every other case such judgment shall have preference. A mortgage

¹ *Indiana*: G. & H. Stat. vol. ii. p. 356; 2 R. S. 1876, p. 334. *Kansas*: Dassel's Stat. 1876, c. 68, § 4. *Mississippi*: Rev. Code of 1871, p. 501; R. Code, 1880, § 1205. *Maryland*: Pub. Gen. Laws, 1860, art. 64, § 3. *New Jersey*: Nixon's Dig. p. 147, § 20; R. S. 1877, p. 167, § 77. *New York*: Code of Remedial Justice, 1876, § 1254. *Delaware*: Rev. Stat. 269. *North Carolina*: Battle's Revisal, 1873, c. 35, § 30. *Georgia*: Act of 1875. Prior to that act dower had preference to such a mortgage. *Wilson v. Peeples*, 61 Ga. 218; *Carter v. Hallahan*, 61 Ga. 314.

² *Birnie v. Main*, 29 Ark. 591; *Stow v. Tift*, 15 Johns. (N. Y.) 458; *Mills v. Van Voorhies*, 20 N. Y. 412; *Thomas v. Han-son*, 44 Iowa, 651; *Hinds v. Ballou*, 44 N. H. 619; *Thompson v. Lyman*, 28 Wis. 266; *Walters v. Walters*, 73 Ind. 425.

³ *Clark v. Munroe*, 14 Mass. 351; *McGowan v. Smith*, 44 Barb. (N. Y.) 232; *Kittle v. Van Dyck*, 1 Sandf. (N. Y.) Ch. 76; *Jones v. Parker*, 51 Wis. 218; *Kaiser v. Lembeck* (Iowa), 7 N. W. Rep. 519; *Billingsley v. Niblett*, 56 Miss. 537.

⁴ *Young v. Tarbell*, 37 Me. 509.

⁵ *Kimble v. Eaworthy*, 6 Bradw. (Ill.) 517; *Guinn v. Spurgin*, 1 Lea (Tenn.), 228.

⁶ *Guinn v. Spurgin*, *supra*; *Middlebrooks v. Warren*, 59 Ga. 230. See, however, § 465.

⁷ *Ahern v. White*, 39 Md. 409; *Henisler v. Nickum*, 38 Md. 270; *Foster's App.* 3 Pa. St. 79.

⁸ *Cake's App.* 23 Pa. St. 186; *Maybury v. Brien*, 15 Pet. 21; *Banning v. Edes*, 6 Minn. 402; *Summers v. Darne*, 31 Gratt. (Va.) 791.

from a lessee to his lessor, delivered at the same time with the lease, to secure future advances, is within this provision.¹

If the vendor neglects to take a mortgage for purchase money, until after the execution of a mortgage to a third person for value and without notice, the mortgage for purchase money is subject to the prior mortgage.²

A provision of statute, that a mortgage for purchase money shall be preferred to any previous judgment which may have been obtained against the purchaser, applies only to a mortgage made by the purchaser to the vendor, and not to a mortgage made to a third person to secure the payment of money which was applied by the purchaser to the payment of the purchase money of the land. The term purchase money does not include money that may be borrowed to complete a purchase, but that which is stipulated to be paid by the purchaser to the vendor. It is only between them that it is purchase money. As between the purchaser and a third party, it is simply borrowed money. To give this provision any other construction would be to assign and enlarge the vendor's lien without limit.³

The effect of a mortgage to secure purchase money, executed simultaneously with the deed to the vendee, is, that the vendee has only an instantaneous seisin, and the legal title remains with the vendor, who becomes the mortgagee of the land.⁴

A reservation in a conveyance of an annual rent, with a condition that the grantor may enter and take possession in case of non-payment, is in effect a conveyance and mortgage back for the purchase money, and is superior to any other incumbrance which the grantee can create.⁵

466. A purchase money mortgage, executed simultaneously with the deed of purchase, excludes any claim or lien arising through the mortgagor, and no statute is necessary to effect this.⁶ "It is a principle of law," says Chief Justice Caton,

¹ *Ahern v. White*, 39 Md. 409.

² *Houston v. Houston*, 67 Ind. 276.

³ *Heuisler v. Nickum*, 38 Md. 270; *Al-derson v. Ames*, 6 Md. 52, 56; *Stansell v. Roberts*, 13 Ohio, 148; *Calmes v. McCracken*, 8 S. C. 87. In *Clabaugh v. By-erly*, 7 Gill (Md.), 354, it was decided that a junior mortgage was entitled to no preference over a prior one by showing that the money received upon it was applied in payment of judgments which had

priority. See, however, § 464, and *Flanagan v. Cushman*, 48 Tex. 241, that a homestead right does not intervene in such case.

⁴ *Baker v. Clepper*, 26 Tex. 629.

⁵ *Stephenson v. Haines*, 16 Ohio St. 478.

⁶ *City Nat. Bank App.* 91 Pa. St. 163; *Fitts v. Davis*, 42 Ill. 391; *Banning v. Edes*, 6 Minn. 402; *Bolles v. Carli*, 12 Minn. 113.

of Illinois,¹ "too familiar to justify a reference to the authorities, that a mortgage given for the purchase money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagée, without stopping at all in the purchaser, and during this instantaneous passage the judgment lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any supposed equity which the vendor might be supposed to have for the purchase money."

For the same reason a mortgage for purchase money recorded with the deed of purchase has priority of a mortgage executed by the purchaser before he concluded the purchase to secure a loan with which to make the cash payment, though this mortgage be recorded before the mortgage to the vendor.²

A change in the form of the security for the purchase money, as from a mortgage to a deed of trust, will not change the character of the debt. The consideration continues to be purchase money.³ The same rule applies in case the mortgage is to another than the vendor, who actually advances the means to pay the purchase money.⁴

It must appear, however, that the deed and mortgage constituted but one transaction.⁵ The seisin of the purchaser being merely a transitory one, no lien can intervene, and therefore the same rule applies to the exclusion of any intervening lien; as, for instance, a lien for labor and materials furnished the purchaser, who has entered before the execution of the deed and mortgage, which are afterwards delivered simultaneously;⁶ or an agreement made in relation to the premises by the purchaser before the pur-

¹ *Curtis v. Root*, 20 Ill. 53.

² *Turk v. Funk*, 68 Mo. 18; *City Nat. Bank App.* 91 Pa. St. 163.

³ *Curtis v. Root*, *supra*; *Austin v. Underwood*, 37 Ill. 438; *Summers v. Darne*, 31 Gratt. (Va.) 791.

⁴ *Curtis v. Root*, *supra*; *Jackson v. Austin*, 15 Johns. (N. Y.) 477; *Haywood v. Nooney*, 3 Barb. (N. Y.) 643; *Adams v. Hill*, 29 N. H. 202.

⁵ *Grant v. Dodge*, 43 Me. 489. See

Hurlbert v. Weaver, 24 Minn. 30, for peculiar circumstances under which a deed and mortgage executed at different times were regarded as constituting one transaction.

⁶ *Lamb v. Cannon*, 38 N. J. L. 362; *Strong v. Van Deusen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242; *Guy v. Carriere*, 5 Cal. 511. Otherwise in Georgia by statute. Code, § 1979; *Tanner v. Bell*, 61 Ga. 584.

chase;¹ or right of homestead;² or right of dower.³ If there be an interval of time between the purchase and the making of a mortgage to secure the purchase money, the wife is not barred of her right of dower by reason of any recitals made by the husband in the mortgage deed in which the wife does not join.⁴

A suit to foreclose a mortgage, given to secure the purchase money of land, is not a suit for the enforcement of a vendor's lien. Neither the husband nor wife can set up a homestead right against such a mortgage given contemporaneously with the deed of purchase.⁵ A mortgage for purchase money has priority over a mechanic's lien for a building erected by the purchaser before he received a deed, and while he held a bond for a deed, and although the lien was filed before the making of the deed.⁶

467. Of course the recording of a mortgage is not necessary as against the mortgagor;⁷ or against his heirs on whom the law casts the property, and who are mere volunteers in accepting it;⁸ and even in those states where it is provided by statute that a mortgage shall be recorded within a stipulated time, it is still valid between the parties without registration. The mortgagee by an unrecorded mortgage will be protected by a court of equity, so far as this can be done without infringing upon the rights of subsequent purchasers, or third persons who have in the mean time acquired liens of record upon the property.⁹ It is for their protection, however, that a record is provided for. As between the parties themselves, there is no occa-

¹ *Bolles v. Carli*, 12 Minn. 113; *Morris v. Pate*, 31 Mo. 315.

² *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390; *Jones v. Parker*, 51 Wis. 218; *Carr v. Caldwell*, 10 Cal. 380; *Amphlett v. Hibbard*, 29 Mich. 298; *Nichols v. Overacker*, 16 Kans. 54; *Magee v. Magee*, 51 Ill. 500; *Austin v. Underwood*, 37 Ill. 438; *Allen v. Hawley*, 66 Ill. 164, 168; *Lane v. Collier*, 46 Ga. 580. See *Pratt v. Topeka Bank*, 12 Kans. 570. For a case where a mortgage given upon a homestead by husband and wife was partly paid, and a new mortgage for the balance given by the husband alone; explained in *Greeno v. Barnard*, 18 Kans. 518.

³ *George v. Cooper*, 15 W. Va. 666; *Jones v. Parker*, 51 Wis. 218.

⁴ *Tibbetts v. Langley Manufacturing Co.* 12 S. C. 465.

⁵ *Hopper v. Parkinson*, 5 Nev. 233; *Hand v. Savannah & Charleston R. R. Co.* 12 S. C. 314.

⁶ *Virgin v. Brubaker*, 4 Nev. 31.

⁷ *Wood v. Chapin*, 13 N. Y. 509; *St. Marks F. Ins. Co. v. Harris*, 13 How. (N. Y.) Pr. 95; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Jackson v. West*, 10 Johns. (N. Y.) 466; *Fosdick v. Barr*, 3 Ohio St. 471; *Sidle v. Maxwell*, 4 Ohio St. 236; *Levinz v. Will*, 1 Dall. 430; *Leggett v. Bullock*, Busb. (N. C.) L. 283; *Scaver v. Spink*, 65 Ill. 441; *Howard Mut. Loan & Fund Ass'n v. McIntyre*, 3 Allen (Mass.), 571; *Perdue v. Aldridge*, 19 Ind. 290; *Carleton v. Byington*, 18 Iowa, 482; *Moore v. Thomas*, 1 Oreg. 201.

⁸ *McLaughlin v. Ihmsen*, 85 Pa. St. 364; *Tryon v. Munson*, 77 Ib. 250.

⁹ *Wynn v. Carter*, 20 Wis. 107; *Kirkpatrick v. Caldwell*, 32 Ind. 299.

sion for a public record to give notice. Although it has sometimes been said that the delivery of a mortgage for record is a part of the execution of the instrument, this is not true except so far as the expression has reference to its effect upon those who are not parties to it.¹ Even the destruction of the mortgage before the recording of it, whether by accident or by the wrongful act of a third person, does not annihilate the lien as between the parties and all others claiming with notice.²

A mortgage without acknowledgment or record is good against the mortgagor, and his heirs or devisees, and against others who have actual notice of its existence before they acquired title.³ If the title is not dependent upon the time of recording, and the record is merely to authorize its introduction as evidence, it may be recorded after action brought to enforce it, and at any time before trial. This rule is equally applicable to the case of an assignment of a mortgage, which may be recorded after the assignee has brought an action to foreclose, and at any time before trial and judgment.⁴

It is only subsequent purchasers for value without notice who can take advantage of the fact that a prior mortgage is unrecorded.⁵

468. The assignee of a bankrupt has no greater rights in respect to unrecorded deeds made by the debtor than he himself would have. He therefore takes the bankrupt's estate, subject to any conveyances he has made, although they remain unrecorded. But one who purchases of the assignee, without notice of an unrecorded mortgage, takes the property unincumbered by it.⁶ So if an administrator of an insolvent estate, having no knowledge of an unrecorded mortgage on certain real estate of the deceased, sells it under order of court to a purchaser who was also ignorant of the mortgage, and therefore acquired a title unaffected by it, the mortgagee is entitled to be reimbursed from the proceeds of the land in preference to the general creditors.⁷

469. Equitable mortgages are generally held to be within the recording acts as much as are legal mortgages.⁸ At first a

¹ *Sidle v. Maxwell*, 4 Ohio St. 236; limiting *Holliday v. Franklin Bank of Columbus*, 16 Ohio, 533.

² *Sloan v. Holcomb*, 29 Mich. 153.

³ *Johnston v. Canby*, 29 Md. 211; *Marshall v. Fisk*, 6 Mass. 24; *Dole v. Thurlow*, 12 Met. (Mass.) 157, 162.

⁴ *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

⁵ *Merriman v. Hyde*, 9 Neb. 113.

⁶ *Hodgen v. Guttery*, 58 Ill. 431.

⁷ *Kirkpatrick v. Caldwell*, 32 Ind. 299.

⁸ *Hunt v. Johnson*, 19 N. Y. 279; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch.

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different interpretation was put upon the acts, and a mortgage of an equity or of an equitable estate was not constructive notice when registered.¹ But at an early day in this country it was established, either judicially or by statute, that all rights, incumbrances, or conveyances touching or in any way concerning land, should appear upon the public records, and that conveyances of equitable interests as well as legal were within the registry acts. A mortgage, therefore, of such an interest, if first recorded, is preferred to a mortgage of the legal estate.² A mortgage of an equitable interest under a contract of purchase, although no legal estate passes by it, is within the operation of the registration acts, and should be recorded to entitle it to priority over a subsequent mortgage of the same interest; and an assignment of such a contract as a security for a debt is regarded as a mortgage.³

Generally the record of an agreement constituting an equitable mortgage is notice to a subsequent purchaser of the legal estate.⁴ One in possession of lands under a parol contract to purchase them may mortgage his interest in them, and the record of the mortgage will be notice to subsequent purchasers and incumbrancers.⁵ But, on the other hand, it is held that the mortgage of an equitable title, such as that constituted by a bond for a deed, is not constructive notice to purchasers of the land from a holder of the legal title.⁶

470. An equitable mortgagee for a precedent debt has no equity superior to that of a creditor having a valid subsequent judgment at law. Between such contestants the first perfected legal title should prevail. The rule is otherwise with regard to *bond fide* purchasers or equitable mortgagees, where the consideration of the mortgage is paid at the time it is given. Equity in the latter case regards the equitable mortgagee as a *bond fide* purchaser.⁷

471. The recording acts apply as well to mortgages of lease-

394; *Crane v. Turner*, 7 Hun (N. Y.), 357; *Boyce v. Shiver*, 3 S. C. 515.

¹ *Doswell v. Buchanan*, 3 Leigh (Va.), 365, 377.

² *U. S. Ins. Co. v. Shriver*, 3 Md. Ch. Dec. 381; and see *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. vol. 2, part 1, p. 204, where the cases are collected.

³ *Bank of Greensboro v. Clapp*, 76 N. C. 482.

⁴ *Parkist v. Alexander*, 1 Johns. (N. Y.)

Ch. 394; *Hunt v. Johnson*, 19 N. Y. 279; *General Ins. Co. v. United States Ins. Co.* 10 Md. 517; *Jarvis v. Dutcher*, 16 Wis. 307.

⁵ *Crane v. Turner*, 7 Hun (N. Y.), 357.

⁶ *Halsteads v. Bank of Ky.* 4 J. J. Marsh. (Ky.) 554; *Irish v. Sharp*, 89 Ill. 261.

⁷ *Wheeler v. Kirtland*, 24 N. J. Eq. 552.

hold estates of such duration of term as to come within the recording acts of the several states as to mortgages of freehold estates.¹ Such mortgages are not only, as a general rule, within the terms of these acts, but likewise within the reason and spirit of them, inasmuch as they are equally within the mischief for which they provide a remedy; and they do not come under the provisions relating to the recording of mortgages of personal property, as these have reference only to chattels personal.²

472. The registration laws and the doctrines of priority by record generally extend to assignments of mortgages as well.³

¹ Decker v. Clarke, 26 N. J. Eq. 163; Berry v. Mutual Ins. Co. 2 Johns. (N. Y.) Ch. 603; Johnson v. Stagg, 2 Johns. (N. Y.) 510, 523; Breese v. Bange, 2 E. D. Smith (N. Y.), 474.

² Decker v. Clarke, *supra*.

³ § 820. New York: Belden v. Meeker, 47 N. Y. 307; S. C. 2 Lans. 470, overruling Hoyt v. Hoyt, 8 Bosw. 511; Vanderkemp v. Shelton, 11 Paige, 28; S. C. Clarke, 321; Fort v. Burch, 5 Den. 187; St. John v. Spalding 1 Thomp. & C. 483; James v. Johnson, 6 Johns. Ch. 417; James v. Morey, 2 Cow. 246; Campbell v. Vedder, 1 Abb. App. Dec. 295. Iowa: Bowling v. Cook, 39 Iowa, 200; Bank of the State of Ind. v. Anderson, 14 Ib. 544; McClure v. Burris, 16 Ib. 591; Cornog v. Fuller, 30 Ib. 212. New Jersey: Stein v. Sullivan, 31 N. J. Eq. 409; Tradesmen's Building & Loan Ass'n v. Thompson, 31 N. J. Eq. 536. Illinois: Turpin v. Ogle, 4 Bradw. 611; Smith v. Keohane, 6 Bradw. 585.

In Indiana, before the statute providing for the record of assignments, the record of them was not notice. Hasselman v. McKernan, 50 Ind. 441; Dixon v. Hunter, 57 Ind. 278. Now, by statute, any mortgage of record, or any part thereof, may be assigned, either by an assignment entered on the margin of such record, signed by the person making the assignment and attested by the recorder, or by a separate instrument executed and acknowledged before any person authorized to take acknowledgments, and recorded on such margin, or in the mortgage records of the county. Acts 1877, c. 58, § 1.

In Pennsylvania the record of an assignment of a mortgage is notice to subsequent assignees of the mortgage. Neide v. Pennypacker, 9 Phila. 86; and to subsequent purchasers and mortgagees as well. Leech v. Bonsall, Ib. 204. These decisions are based on the Act of April 9, 1849, § 14. So far as the general recording act of 1715 is concerned, "though there has been no express decision that under it an assignment of a mortgage may be recorded, so as to be notice to subsequent purchasers; yet, taking the latest expression of the Supreme Court on the subject, we might so decide without disregarding any binding authority, or any clearly indicated opinion of that court." Per Mr. Justice Mitchell in Neide v. Pennypacker, *supra*; citing Philips v. Bank of Lewiston. 18 Pa. St. 394, 401. In the later case of Pepper's Appeal, 77 Pa. St. 373, it was distinctly held that the recording of an assignment is notice to a subsequent assignee under the above statute. Mr. Justice Mercur, delivering the opinion of the court, said it was alleged in the argument that it is not customary in Philadelphia to search the records for assignments of mortgages. Be that as it may, if any custom exists not in harmony with the act, it must give way. *Malus usus abolendus est*.

In Maryland provision was made for recording assignments of mortgages by Act 1868, c. 373; R. Code, 1878, art., 44, §§ 37, 38; but this does not affect an equitable assignment. Byles v. Tome, 39 Md. 461.

The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of the mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, or if the mortgagee takes a conveyance of the equity of redemption, and then with an apparent ample title conveys the property to another, the mortgage ceases to be a lien, as against one who purchases the property in good faith and without notice.¹ In like manner an assignee of the mortgage is not bound by an unrecorded agreement executed between the parties to the mortgage, whereby the mortgagee was bound to release a portion of the premises upon receiving a certain sum in payment.² The doctrine, that the assignee of a mortgage takes it subject to all equities existing between the mortgagor or his grantees and the mortgagee, cannot be applied to those instruments which are properly designated in the recording acts as conveyances, which both a release of a mortgage and an agreement for such release would be, without nullifying the acts to that extent, and withholding the protection they were designed to confer upon purchasers.³

But the record of an assignment of a mortgage is not constructive notice of it to the mortgagor so as to make invalid a payment made by him to the mortgagee.⁴ It is desirable, for this reason, that personal notice should be given him of the assignment, though the assignee's title is complete without notice to the owner of the equity of redemption.⁵

It has been held that a power of attorney to assign a mortgage,⁶ or one to collect a mortgage and discharge it,⁷ are not within the recording acts, and therefore a record of them is not notice.

473. It is provided by statute in several states that the recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs, or personal representatives, so as to invalidate any payment made

¹ *Bowling v. Cook*, 39 Iowa, 200; *Henderson v. Pilgrim*, 22 Tex. 464; *Turpin v. Ogle*, 4 Bradw. (Ill.) 611; *Smith v. Keohane*, 6 Ib. 585; *Bacon v. Van Schoonhoven*, 19 Hun (N. Y.), 158.

² *Warner v. Winalow*, 1 Sandf. (N. Y.) Ch. 430; *St. John v. Spalding*, 1 Thomp. & C. (N. Y.) 483.

³ *St. John v. Spalding*, *supra*.

⁴ *Ely v. Scofield*, 35 Barb. (N. Y.) 330; 617.

N. Y. Life Ins. & Trust Co. v. Smith, 2 Barb. (N. Y.) Ch. 82. So provided by statute in Wisconsin. Rev. Stat. 1871, p. 1149.

⁵ *Jones v. Gibbons*, 9 Ves. 407, 410; *Ex parte Barnett*, 1 De G. 194.

⁶ *Williams v. Birbeck*, Hoffm. (N. Y.) 359.

⁷ *Jackson v. Richards*, 6 Cow. (N. Y.)

by them to the person holding the bond or note.¹ In New Jersey, on the other hand, the inference to be drawn from the statute in regard to the recording of assignments is that this record is notice to the owner of the equity of redemption; for it is provided that if the assignment be not recorded, any payments made in good faith and without actual notice of the assignment, and any release of the premises to a person not having actual notice of the assignment, are as valid as if the mortgage had not been assigned.² It is provided, too, that the record of an assignment of a mortgage is notice from the time it is left for record to all persons concerned; and an assignee by an assignment not recorded is bound by any sale in a foreclosure suit, instituted by the holder of the recorded assignment.

In Indiana the mortgagor and all other persons are bound by the record of an assignment, and the same is deemed a public record. Any assignee or his personal representative may enter satisfaction or release of the mortgage, or the part thereof held by him of record.³

In Dakota Territory an assignment of a mortgage may be recorded in like manner with a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor.⁴

The object of the statutory provisions that the record of an assignment shall not be deemed in itself notice to the mortgagor, his heirs, or personal representatives, of such assignment, so as to invalidate any payment made by him or them to the mortgagee, was to save the necessity of examining the record every time a payment is made. It is argued, therefore, that for all other purposes the record of the assignment is notice even to the mortgagor. Accordingly it has been held under these provisions that the record of an assignment of a mortgage is constructive notice as against a grantee of the mortgagor, that the mortgagee can no longer deal with the mortgage title; and a subsequent discharge

¹ California: Civ. Code, § 2935; Acts 1874, p. 261; Codes & Statutes, 1876, § 7935.

Kansas: Dassel's Stats. 1876, c. 68, § 3.

Michigan: Compiled Laws, 1871, p. 1347.

Minnesota: G. S. 1878, c. 40 § 24.

Nebraska: G. S. 1873, c. 61, § 39; Compiled Stats. 1881, p. 392.

New York: Fay's Dig. of Laws, 1874, vol. 1, p. 585.

Oregon: Gen. Laws, 1872, p. 519.

Wisconsin: R. S. 1878, p. 641, § 2244.

Wyoming Territory: Comp'd Laws, 1876, c. 3, § 17.

² Nixon's Dig. 1868, p. 612.

³ Acts 1877, t. 58, § 1.

⁴ Civil Code, 1871, § 1629.

or release of the mortgage executed by the mortgagee is invalid.¹ If the release is obtained by the mortgagor himself without the payment of any sum of money upon the mortgage debt, the statute does not protect him against the effect of an assignment already recorded.²

474. The effect of recording an assignment is not only to protect the assignee against a subsequent sale of the mortgage by the apparent holder of it, but also to prevent a wrongful discharge of it by the mortgagee.³ It is true that as against subsequent purchasers of the premises, or the holders of subsequent mortgages upon them, and attaching and judgment creditors, the record of a prior mortgage is sufficient notice of its existence without the record of an assignment of the mortgage to one who has purchased it. The failure to record the assignment does not blot out the record of the mortgage itself.⁴ If the premises are conveyed to the mortgagee after he has assigned the mortgage, there is no merger of the mortgage title.⁵ It makes no difference that the assignment is not recorded. If the mortgagee, in this condition of the title, then conveys the estate to one who purchases without knowledge of the assignment of the mortgage, the question arises whether the assignee, having omitted to record his assignment, thus leaving, so far as the record shows, a complete title in the mortgagee, can be protected in his title as against the purchaser from the mortgagee?⁶

Of course such purchaser is charged with constructive notice of the existence of a mortgage, and of the continuance of its lien, by its record. Having this information he is chargeable in law with the further notice, that the mortgage is a lien in the hands of any person to whom it may have been legally transferred, and that the record of such transfer is not necessary to its validity, nor as a protection against a purchaser of the property mort-

¹ *Belden v. Meeker*, 47 N. Y. 307; 2 *Lans. (N. Y.)* 470; *Viele v. Judson*, 82 N. Y. 32.

² *Belden v. Meeker*, *supra*.

³ § 566; *Crane v. Turner*, 67 N. Y. 437; *Van Keuren v. Corkins*, 66 N. Y. 77. See §§ 872, 956.

⁴ *Campbell v. Vedder*, 3 Keyes (N. Y.), 174; S. C. 1 Abb. (N. Y.) App. Dec. 295; *Sprague v. Rockwell*, 51 Vt. 401; *Viele v. Judson*, *supra*.

It is a too narrow view of the authorities to say that the record of the assign-

ment protects merely against a subsequent assignment by the mortgagee.

⁵ *Campbell v. Vedder*, *supra*; *Purdy v. Huntington*, 42 N. Y. 334.

⁶ This, then, is the case: "A. sells and conveys land to B. B. gives back a bond and mortgage for the purchase money. A. sells and assigns the bond and mortgage to C., and afterwards receives a conveyance of the equity of redemption from B., and then by a full covenant deed conveys the land, and all his estate and interest in the land, to D."

gaged, or any other person than a subsequent purchaser in good faith of the mortgage itself, or the bond or debt secured by it; but rather that one purchasing the premises from the mortgagee would take them subject to the lien of the mortgage irrespective of the ownership of it, unless the mortgagee was the owner. That knowledge and notice make it his duty, in the exercise of proper diligence, to inquire whether his vendor, the mortgagee, is still the owner of the mortgage, and his omission to make that inquiry deprives him of the protection of a *bona fide* purchaser.¹

The rule that a mortgagor is entitled to deal with the mortgagee as the holder of the mortgage, until he has actual notice of an assignment, has no application when the mortgage is given to secure a negotiable note, and this is transferred before it is due.²

A different rule prevails in Massachusetts.³ There the estate of a mortgagee of land is a legal estate, which passes by the same instruments of conveyance as other legal estates. It is declared to be as important to be able to ascertain from the registry the existence or continuance of a mortgage, as of any other legal title. "Not unfrequently the whole or part of an estate held in mortgage is released or conveyed, when the debt is not paid; and in the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other."⁴

475. An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption.⁵ If he purchases in good faith and for a valuable consideration, he is not chargeable with any notice his assignor had of prior incumbrances upon the property, provided he records his assignment before such prior mortgage or other deed is recorded.⁶ He is then chargeable only with constructive notice, such as is afforded by record, or by open and adverse possession of the premises by another.⁷ The as-

¹ § 804; *Purdy v. Huntington*, 42 N. Y. 334; overruling *S. C. 46 Barb. (N.Y.)* 389; and see *Van Keuren v. Corkins*, 6 *Thomp. & C. (N. Y.)* 355; *S. C. 4 Hun*, 129; 66 N. Y. 77; *Gillig v. Maass*, 28 N. Y. 191; *Warner v. Winslow*, 1 *Sandf. (N. Y.) Ch.* 430; *Burhans v. Hutcheson*, 25 *Kans.* 625; *Oregon Trust Co. v. Shaw*, 5 *Sawyer*, 336, quoting and approving the text.

² *Jones v. Smith*, 22 *Mich.* 360.

³ *Welch v. Priest*, 8 *Allen (Mass.)*, 165; *Wolcott v. Winchester*, 15 *Gray (Mass.)*, 461, stated in § 804; *Blunt v. Norris*, 123 *Mass.* 55.

⁴ *Welch v. Priest*, *supra*, per Hoar, J.

⁵ *Westbrook v. Gleason*, 79 N. Y. 23; *Decker v. Boice*, 83 N. Y. 215; *Smyth v. Knickerbocker L. Ins. Co.* 84 N. Y. 589.

⁶ *Decker v. Boice*, *supra*.

⁷ *Trustees of Union College v. Wheeler*,

signee gains priority in such case, not by the prior recording of the assigned mortgage, but by the prior recording of his own assignment.¹ If the assignee omits to record his assignment, and an elder mortgage of which he had no notice, but of which his assignor had notice, is first recorded, he will hold subject to such elder mortgage; and he would also hold subject to it if such elder mortgage had been recorded before he took the assignment, but after the recording of the mortgage assigned.²

Thus where there were two successive mortgages of the same land, and the mortgagor in the first mortgage was the mortgagee in the second, and the second mortgage was first recorded and was then assigned to a *bond fide* purchaser for value before the first mortgage was recorded, but the assignment was not recorded until after the recording of the first mortgage, the mortgagee in the second mortgage could not claim priority, because when he recorded his mortgage he had notice of the prior mortgage which he had himself executed. It was held, in a controversy between assignees of the respective mortgages, that the assignee of the second mortgage could derive no benefit from the prior record of his mortgage, as he stood as to that in the shoes of his assignor; and that he was not entitled to priority by the record of his assignment, because the first mortgage was recorded before the recording of his assignment. But it was conceded, that if he had recorded his assignment before the first mortgage was recorded he would have gained a preference.³

476. It is not often that the question of priority of rights under different assignments of the same mortgage can arise, because an assignment is generally accompanied by a delivery of the note or bond secured by the mortgage and of the mortgage itself; and except under peculiar circumstances a person acting in good faith would not take a mere written transfer of the mortgage title without a delivery of these.⁴ The fact that the assignor did not have these papers to deliver would be enough ordinarily to put the purchaser on his guard, even if it did not

59 Barb. (N. Y.) 585; Jackson v. Van Valkenburgh, 8 Cow. (N. Y.) 260; Bush v. Lathrop, 22 N. Y. 535, 549; Varick v. Briggs, 6 Paige (N. Y.), 323; Jackson v. Given, 8 Johns. (N. Y.) 137.

¹ Decker v. Boice, *supra*. The contrary rule declared in Jackson v. Van Valkenburgh, 8 Cow. (N. Y.) 260, is no longer in force. Bank for Savings in

N. Y. v. Frank, 45 N. Y. Superior Ct. 404.

² Fort v. Burch, 5 Denio (N. Y.), 187; De Lancey v. Stearns, 66 N. Y. 157.

³ Westbrook v. Gleason, 79 N. Y. 23, reversing same case, 14 Hun, 245. This case is stated and approved by Andrews, J., in Decker v. Boice, 83 N. Y. 215, 221.

⁴ Porter v. King (D. C. Pa. 1880), 1 Fed. Rep. 755.

amount to notice to him of a prior assignment. At any rate, the absence of these papers would be enough to put in doubt his good faith in taking the assignment; and would make him chargeable with notice of any defect there may be in the assignor's title.¹

But if two assignments of the same mortgage by any means are made and taken by different persons in good faith, of course the assignee who first records his assignment would gain the better title to the mortgage, if he has paid full value for it at the time of taking it. If he paid only part of the consideration, then he would have priority only to the extent of the payment made by him; for he is then a purchaser, and entitled to protection only to that extent.²

477. Manner of recording an assignment. — When an assignment of a mortgage is indorsed upon the mortgage deed, which is referred to as "the within described mortgage," it is sufficient to record the assignment without recording the mortgage with it anew.³ A reference is usually made by the register from the record of one instrument to the other; but unless required by law, this is not essential. A recital of the names of the parties to the mortgage, and its date, is a sufficient identification of it; although it is usual in addition to this description, when the assignment is not indorsed upon the mortgage, to refer, in the description of it, to the book and page of the record. But neither a reference to the record of the mortgage nor a description of the mortgaged lands is necessary. An assignment is sufficient which so identifies the mortgage that by examining the records the one referred to can be ascertained.⁴

It is usual for the register to note an assignment upon the margin of the record of a mortgage; and in many states it is made by statute his duty to do so. But in the absence of such a statute the omission of the register to do so does not affect the right of the assignee.⁵

478. The same principles apply equally to the record of any agreement affecting a mortgage. If not executed with the

¹ Kellogg v. Smith, 26 N. Y. 18; Brown v. Blydenburgh, 7 N. Y. 141.

² Pickett v. Barron, 29 Barb. (N. Y.) 505; Purdy v. Huntington, 46 Barb. (N. Y.) 389; S. C. 42 N. Y. 334; Campbell v. Vedder, 3 Keyes (N. Y.), 174; Bush v. Lathrop, 22 N. Y. 535; Wiley v. William-

son, 68 Me. 71; Oregon Trust Co. v. Shaw, 5 Sawyer, 336; Potter v. Strausky, 48 Wis. 235. See § 566.

³ Carli v. Taylor, 15 Minn. 171.

⁴ Viele v. Judson, 82 N. Y. 32.

⁵ Viele v. Judson, *supra*, overruling Moore v. Sloan, 50 Barb. (N. Y.) 442.

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formalities entitling it to be recorded, the record affords no constructive notice of its contents. If, for instance, land subject to a mortgage is sold, and mortgaged back for the purchase price, the vendor agreeing to pay off the elder mortgage, or in default of so doing to allow the purchaser to pay it, and have the amount of it deducted from the mortgage given for the price of the land, and this agreement without being entitled to be recorded is nevertheless put upon record, and the purchaser subsequently pays the elder mortgage as contemplated by the agreement, an assignee of the mortgage for the purchase money, having no actual notice of this agreement, is not concluded by it; but may hold his mortgage for the original amount of it.¹

A release of a part of the mortgaged premises is a conveyance by which the title to real estate may be affected, and unless it be recorded, it is void against a subsequent assignee of the mortgage for value, and without notice.² An unrecorded agreement to release is in like manner void against an assignee of the mortgage in good faith.³

479. The registry laws apply to a mortgage of a growing crop, or to an agreement constituting a lien upon it. A verbal agreement, or an agreement in writing not recorded, whereby the crop is pledged by a tenant of land to the owner as security for advances, is of no validity as against a mortgage of it afterwards made and duly recorded.⁴

479 a. The statutes providing for mechanics' liens qualify and affect and sometimes destroy the priority of mortgages, as established by the registry laws; and it is therefore important that these statutes should be considered in connection with the registry laws. Such liens may be given priority of mortgages executed and recorded subsequently to the date of the contract under which the lien is claimed, as is the case in Massachusetts;⁵ but more frequently, mechanics' liens are given precedence of

¹ Dutton v. Ives, 5 Mich. 515.

² Mutual Life Ins. Co. v. Wilcox, 55 How. (N. Y.) Pr. 43.

³ St. John v. Spalding, 1 T. & C. (N. Y.) 483.

⁴ Jones v. Chamberlin, 5 Heisk. (Tenn.) 210. This case is distinguished from *Tedford v. Wilson*, 3 Head (Tenn.), 311, where it was agreed that the proceeds of a farm should be liable for the wages of a person who entered into possession of it

and carried it on for the owner. Being in possession he was held to be entitled to apply the crops to the satisfaction of his claim for wages as against a creditor of the owner, and that the registration act did not apply. As to mortgages of crops, see *Jones on Chattel Mortgages*, §§ 142-146.

⁵ *Dunklee v. Crane*, 103 Mass. 470.

For lien laws affecting the priority of railroad mortgages, see *Jones on Railroad Securities*, §§ 573-613.

mortgages upon the property recorded after the commencement of the work or improvement for which the lien is claimed. The argument in favor of such a provision is, that one who takes a mortgage upon a building in process of erection, or upon land upon which any improvements for which a lien is given are making, he is bound to know that there may be a lien upon the property for the work already done, and to assume that the work is to go forward, and that there may be a further lien for completing the work. It is not desirable, either, that the execution of a mortgage upon the land should be permitted to arrest the work and prevent its completion, as would most likely happen if the making of the mortgage had the effect of postponing any lien afterwards filed. It is regarded also as just that the mechanic should have the benefit of the labor and materials that go into the property and give it value, rather than the mortgagee, who has taken his mortgage during the *progress* of the work.¹

Under still other statutes a *bond fide* mortgagee is regarded as a purchaser who is not affected by a mechanic's lien unless he has received actual or constructive notice of it in a manner prescribed; and the fact that the mechanic is at work upon the building, at the time of the mortgage, is not actual notice of his lien.²

This lien is waived by taking a mortgage³ or other security for the amount for which a lien might be claimed.

The commencement of a building, within the meaning of these statutes, is the first labor done on the ground which is made the foundation of the building, and forms part of the work suitable and necessary for its construction.⁴ It is some work or labor on the ground, such as beginning to dig the foundation, which every one can see and recognize as the commencement of a building; and the work moreover must be done with the intention thus formed of continuing to completion.⁵

When a building is changed or enlarged, the lien attaches from the commencement of the alteration on the ground, and is subject to liens that had previously attached.⁶ As against a mort-

¹ Davis v. Biland, 18 Wall. 659; Neilson v. Iowa Eastern Ry. Co. 44 Iowa, 71; Equitable Life Ins. Co. v. Slye, 45 Iowa, 615.

² Foushee v. Grigsby, 12 Bush (Ky.), 75; Gere v. Cushing, 5 Ib. 304.

³ Trullinger v. Kofoed, 7 Oregon, 228.

⁴ Brooks v. Lester, 36 Md. 65, 70;

Conrad v. Starr, 50 Iowa, 470; S. C. 13 West. Jur. 210; Pennock v. Hoover, 5 Rawle (Pa.), 291.

⁵ Mutual Benefit Life Ins. Co. v. Rowand, 26 N. J. Eq. 389; Brooks v. Lester, 36 Md. 65, 70; Jean v. Wilson, 38 Md. 288, 296.

⁶ Norris's Appeal, 30 Pa. St. 122.

gage the lien of which attached after such commencement of a building or of alterations and additions to it,¹ a lien can be supported for machinery and fixtures afterwards furnished, although not upon the ground at the time, and the work was not done there, but at a distance in shops. When additions to an old building are in their extent and value significant enough to give notice to purchasers and creditors of the change in the character of the property, the additions so made, the work and materials furnished therefor, and the machinery placed therein, are subjects of mechanics' liens as new buildings.²

In computing the time after the completion of work done for which a mechanic's lien is claimed for filing a notice of the lien, occasional repairs made subsequently to the completion of the work cannot be added to the work done months before, so as to render the whole work one continued performance, for which a single lien can be claimed within the time limited by statute.³

A mechanic's lien for repairing or enlarging a building is not paramount to an existing mortgage upon it, even where such lien relates back to the commencement of the work upon a building, so that when a mortgage covers a building partially erected, a lien for work done or materials furnished in completing the building would relate back to the time of the commencement of the building, and would take precedence of the mortgage.⁴ This rule prevails although the building be changed so that very little of the original structure remains; as, for instance, where there was a mortgage upon a paper-mill which was out of repair and was almost wholly removed, and a new one was erected in its place, and this was supplied with new machinery.⁵

Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others who have acquired interest in the property, must make strict proof of all that is essential to the creation of the lien; such, for instance, as proof of the commencement of the work, of its character, and of its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for

¹ Parrish and Hazard's Appeal, 83 Pa. St. 111.

² Parrish and Hazard's Appeal, *supra*.

³ Davis v. Alvord, 94 U. S. 545.

⁴ Getchell v. Allen, 34 Iowa, 559; Neilson v. Iowa Eastern Ry. Co. 44 Iowa, 71.

⁵ Equitable Life Ins. Co. v. Slye, 45 Iowa, 615.

notice of claiming a lien must be filed.¹ Whether the work relied on as having been done prior to the mortgage is to be regarded as *a commencement of the building* is a question of fact, to be determined by the evidence.² The mortgage must be recorded before the building is commenced in order to have priority.³

Under several statutes, as, for instance, that existing prior to 1876 in Iowa, the only manner of establishing the priority of a mechanic's lien upon a *building*, over a preëxisting incumbrance upon the land, was by a sale and removal of the building; and when the nature of the improvement was such that it could not be removed, the lien was necessarily postponed to the prior incumbrance upon the land.⁴ The lien of the mechanic cannot exceed the right of the owner who contracted for the improvements upon the land, and therefore where the owner's interest was an estate in fee of one undivided third part of the property, and a life estate in the remaining two thirds, the lien of the mechanic was limited to the same interests. The owner of such a part interest in the land would not have the power to remove a building erected by him upon it, and a purchaser under a mechanic's lien would acquire no greater right to remove it.⁵ If the owner's interest in the building were such that he might remove it, the right of removal would pass by sale under the mechanic's lien; subject, however, to the qualification that the right of removal depends upon the fact whether the building upon which the materials were furnished and the work done is so far an independent structure as to be capable of being removed without material injury to that which would remain.⁶ If the building cannot be removed without materially injuring or altogether destroying its value; if it be, for instance, a building of brick three stories high, with a stone foundation; or if the interest of the owner be such that he had no right of removal as against others, the lien of a mechanic cannot be enforced through a removal of the building.⁷ A prior mortgage, though given to secure future advances, has precedence.⁸ A mortgage for purchase money has priority.⁹

¹ Davis v. Alvord, 94 U. S. 545.

² Kelly v. Rosenstock, 45 Md. 389.

³ Brooks v. Lester, 36 Md. 65; Meyer v. Construction Co. 100 U. S. 457.

⁴ Conrad v. Starr, 50 Iowa 470; S. C. 13 West. Jur. 210.

⁵ Jessup v. Stone, 13 Wis. 466; Conrad v. Starr, *supra*.

⁶ O'Brien v. Pettis, 42 Iowa, 293.

⁷ Conrad v. Starr, *supra*.

⁸ Lyle v. Ducomb, 5 Binn. (Pa.) 585.

⁹ Campbell's Appeal, 36 Pa. St. 247; Clark v. Butler, 32 N. J. Eq. 664.

2. Registry Acts of the several States.

480. In general. — Although the general effect of the registry acts of the several states is the same, there is considerable difference of detail in them, and no general statement of their provisions would be of any value. It has been thought worth while to give a synopsis of the statutes of each state upon this subject, both on account of the practical use of the statutes themselves, and for the explanation they afford of the want of harmony in the adjudications of different states upon this subject.

481. Alabama. — Mortgages and unconditional conveyances to secure debts created at the date thereof are void as to subsequent purchasers and incumbrancers having no notice, unless recorded in the office of the judge of probate for the county where the property is situated within three months from their date. Other conveyances to secure debts are void as against subsequent purchasers and incumbrancers, who acquire rights before the recording of them. These provisions include absolute conveyances, with a separate defeasance.¹ The object of the statute being the prevention of fraud, the letter of the statute must often yield to the spirit; thus it is held that actual notice of the existence of a mortgage by a subsequent purchaser or mortgagee,² or by a subsequent judgment creditor,³ is equivalent to registration. Nor is the record of the mortgage essential to its validity as against the mortgagor;⁴ or as against his creditors other than judgment creditors.⁵ The record is in law complete from the delivery of the deed to the recording officer,⁶ and therefore a mistake by him in copying, as to the sum secured by the mortgage, cannot prejudice the mortgagee.⁷

481 a. Arizona Territory. — All conveyances affecting real estate are recorded in the office of the recorder of the county in which such real estate is situated, but are valid between the par-

¹ Rev. Code, 1867, §§ 1557, 1558; *Ib.* 1876, §§ 2166, 2168; and see *Coster v. Bank of Ga.* 24 Ala. 37; *De Vendal v. Malone*, 25 Ala. 272. Construed as regards judgment creditors, *Wood v. Lake*, 62 Ala. 489.

² *Wyatt v. Stewart*, 34 Ala. 716; *Boyd v. Beck*, 29 Ala. 703; *Dearing v. Watkins*, 16 Ala. 20.

³ *Wallis v. Rhea*, 10 Ala. 451; *S. C.* 12 Ala. 646; *Jordan v. Mead*, 12 Ala. 247.

⁴ *Smith v. Branch Bank of Mobile*, 21 Ala. 125; *Andrews v. Burns*, 11 Ala. 691.

⁵ *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 866; *Daniel v. Sorrells*, 9 Ala. 436; *Center v. P. & M. Bank*, 23 Ala. 743.

⁶ Code, § 1539.

⁷ *Mims v. Mims*, 35 Ala. 23.

ties without such record. When the record is duly made it imparts notice to all persons of the contents of the deed from the time of filing it with the recorder for record, and all subsequent purchasers and mortgagees are deemed purchasers with notice.¹

482. Arkansas. — A mortgage is a lien on the mortgaged property from the time it is filed for record in the recorder's office for the county where the land is situate, and not before.² It must be proved or acknowledged like a deed for the conveyance of real estate.³ A mortgage not filed for record is void, as against subsequent purchasers from the mortgagor.⁴ The acknowledgment must state that the grantor executed the same for the consideration and purposes therein mentioned and set forth.⁵

483. California. — Mortgages are acknowledged and recorded in the same manner as grants of real estate. They are recorded by the county recorder of the county in which the property is situated. They are deemed to be recorded when, being duly acknowledged and certified, they are deposited in the recorder's office for record. Without such record they are void as against subsequent purchasers in good faith for a valuable consideration whose conveyance is first duly recorded. When a grant purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, the defeasance must be recorded in order to defeat or affect the absolute grant as against any person other than the grantee, his heirs or devisees, or persons having actual notice.⁶

A provision of the Code, repealed in 1874, which allowed the mortgagee one day for every twenty miles between his residence and the recording office for recording his deed, was held to be subject to the provision that the mortgage or conveyance first recorded had precedence.⁷

484. Colorado. — Mortgages are recorded in the office of the recorder of the county where the land is situate, and from the

¹ Compiled Laws, 1877, §§ 2268, 2269.

² Dig. of Stat. 1874, §§ 4287, 4288.

³ Acts 1877, p. 17.

⁴ *Fry v. Martin*, 33 Ark. 203.

⁵ Dig. 1874, § 846. An acknowledgment of the execution of a mortgage for the "uses and purposes" therein specified is insufficient to authorize it to be recorded. The word "uses" is not of the same, or of similar, import as the word "consideration." *Martin v. O'Ban-*

non, 35 Ark. 62. The word "consideration" is essential, and a failure to use it renders the mortgage void against subsequent purchasers, even with notice; but it is good between the parties. *Conner v. Abbott*, 35 Ark. 365.

⁶ Civil Code, 1872, §§ 1169, 1170, 1214, 2950, 2952; 1 Codes & Stats. 1876, §§ 7950, 7952.

⁷ *Odd Fellows Sav. Bank v. Banton*, 46 Cal. 603.

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time of filing of the same for record take effect as to subsequent *bond fide* purchasers and incumbrancers not having notice. Conveyances are deemed to be notice from the time of filing for record, though not acknowledged or proven according to law; but cannot be offered in evidence unless subsequently acknowledged or proved according to law.¹

485. Connecticut. — No mortgage is effectual to hold lands, against any other person but the mortgagor and his heirs, unless recorded on the records of the town where the lands lie. A record of an unacknowledged deed, or of any instrument creating an equitable interest, is notice to all the world of an equitable interest. All conveyances of land of which the grantor is ousted by the entry and possession of another, unless made to the person in actual possession, are void.² Possession by a mortgagee is not, however, *adverse*.³

486. Dakota Territory. — Mortgages are recorded with the register of deeds for the county where the land lies. The record is made in books kept exclusively for mortgages. The conveyance made in good faith and for a valuable consideration which is first recorded has precedence. The record is notice to all subsequent purchasers and incumbrancers. Every grant which appears by any other writing to be intended as a mortgage must be recorded as such; and if such grant and other writing explanatory of its true character be not recorded together at the same time and place, the grantee can derive no benefit from such record.⁴ When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantor or his heirs or devisees, or persons having actual notice, unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the property is situated.⁵

487. Delaware. — Mortgages and conveyances in the nature of mortgages have priority according to the date of record in the recorder's office for the county. If two or more mortgages of the same premises are lodged in the office at the same time, they

¹ Rev. Stat. 1868, pp. 111, 112; Gen. Laws, 1877, §§ 176, 179.

² Revision, 1875, pp. 353, 354.

³ *Sanford v. Washburn*, 2 Root (Conn.), 499.

⁴ Civil Code, 1877, §§ 530, 651, 652, 1626-1628, 1739-1741.

⁵ R. Codes, 1877, §§ 1741-1 a.

stand in priority according to their respective dates. A mortgage for purchase money recorded within sixty days after making it has precedence of any judgment or other lien of prior date.¹

If there be a conveyance absolute on the face of it, and also a defeasance or written contract in the nature of a defeasance, or for a reconveyance of the premises or any part of them, the person to whom such conveyance is made must cause to be indorsed thereon and recorded therewith a note stating that there is such a defeasance or contract, and the general purport of it, or the recording of such conveyance is of no effect; and such defeasance or contract must be duly acknowledged or proved, and recorded in the recorder's office for the county within sixty days after the day of making the same, or it will not avail against a fair creditor, mortgagee, or purchaser for a valuable consideration from the person to whom the conveyance is made; unless it appear that such creditor when giving the credit, or such mortgagee or purchaser when advancing the consideration, had notice of such defeasance or contract.²

488. District of Columbia. — Conveyances of land are recorded in the office of the recorder of deeds. All deeds, except deeds of trust and mortgages, recorded within six months after delivery, take effect and are valid as to all persons from the time they are duly acknowledged or proved. All deeds of trust and mortgages whenever delivered for record, and other conveyances delivered within six months after delivery, take effect and are valid, as to all subsequent purchasers for valuable consideration without notice, and as to all creditors from the time when such deed of trust or mortgage, or other conveyance, shall have been so acknowledged or proved, and delivered to the recorder for record, and from that time only. Of two or more deeds of the same property delivered for record on the same day, that which was first sealed and delivered has preference in law.³

489. Florida. — No mortgage is good or effectual in law or in equity against creditors or subsequent purchasers for value without notice, unless recorded in the county in which the lands are situated; and in order to be entitled to record, its execution by the party making it must be acknowledged by him, or proved upon oath by at least one of the subscribing witnesses, before the officer authorized by law to record the deed, or before some judi-

¹ R. Code, 1874, p. 504.

² R. S. 1874, pp. 52, 53.

³ R. Code, 1874, p. 504.

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cial officer of the state. A deed not recorded within six months after its execution is void against subsequent purchasers. If executed by attorney, the power of attorney must be proved and recorded at the time of recording the mortgage.¹

490. Georgia. — A mortgage must be executed in the presence of, and attested by or proved before, a notary public or justice of any court in this state, or a clerk of the superior court, and by one other witness, and be recorded within thirty days from its date in the county where the land lies in the office of the clerk of the superior court. If not recorded within the time limited, it is valid against the mortgagor, but is postponed to all other liens or purchases made prior to the record without notice of the unrecorded mortgage.² A mortgage recorded in an improper office, or without due attestation, or so defectively recorded as not to give notice to a prudent inquirer, is not notice; but a mere formal mistake in the record does not vitiate it. The due record of a mortgage, though not made within the time prescribed, is notice from the time of record to all the world.³ A junior mortgage does not take precedence of an unrecorded senior mortgage, unless the junior mortgage be recorded within the time prescribed by law.⁴

491. Idaho Territory. — Mortgages to operate as notice to third persons must be recorded in the office of the recorder of the county in which the real estate is situate, but are valid and binding between the parties without such record. All conveyances from the time of filing the same with the recorder for record impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees are deemed to purchase and take with notice. Conveyances not recorded are void as against any subsequent purchaser in good faith and for a valuable consideration whose own conveyance is first recorded.⁵

492. Illinois. — Mortgages are recorded in the county in

¹ Bush's Dig. of Laws, 1872, p. 151; Laws 1873, p. 18.

² Code 1873, §§ 1955-1959, 2705; Laws 1876, p. 34, No. 41; *Hardaway v. Semmes*, 24 Ga. 305; *Richards v. Myers*, 63 Ga. 762; *McGuire v. Barker*, 61 Ga. 339.

A judgment junior in date to a mortgage illegally recorded for want of probate, but founded on a debt antecedent to the date of the mortgage, has priority

of lien to the mortgage, and the purchaser, under the execution issued upon such judgment, acquires good title against the mortgage, though both the judgment creditor and the purchaser had actual notice of the defectively recorded mortgage. *Andrews v. Mathews*, 59 Ga. 466.

³ *Ib.* §§ 1959, 1960.

⁴ *Myers v. Picquet*, 61 Ga. 260.

⁵ R. L. 1875, p. 601.

which the real estate is situated ; but if such county is not organized, then in the county to which such unorganized county is attached for judicial purposes.¹ They take effect and are in force from and after the time of filing for record, and not before, as to all creditors and subsequent purchasers without notice. They are notice from the time of filing for record, though not acknowledged or proven according to law ; but they cannot be read in evidence unless their execution be proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof.²

493. Indiana. — Mortgages are recorded in the recorder's office of the county where the lands are situated ; but if not recorded within forty-five days after their execution, they are fraudulent and void as against subsequent purchasers, lessees, or mortgagees in good faith and for a valuable consideration. When a mortgage is in the form of an absolute conveyance, but is intended to be defeasible by force of a deed of defeasance, bond, or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the defeasance is recorded within ninety days after the date of the deed.³

Under this statute, when a mortgage has been executed to one person and subsequently a deed is executed to another, and neither is recorded within the prescribed time, the respective liens date from the time of record and not from the date of the instruments.⁴ A mortgage recorded after the time limited in the statute is constructive notice to all persons who purchase thereafter.⁵

Between several mortgages executed by a mortgagor upon the same land upon the same day, to secure debts having no priority, and recorded within the time limited, though upon different days, there is no priority.⁶

494. Iowa. — No mortgage is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of the county in which the land lies. To be deemed lawfully recorded, it must have been previously acknowledged or proved.⁷

¹ R. S. 1877 & 1880, c. 30, § 28.

² R. S. c. 30, §§ 30, 31.

³ Revision, 1876, p. 365.

⁴ Reasoner v. Edmundson, 5 Ind. 393.

⁵ Gilchrist v. Gough, 63 Ind. 576 ; S. C.

19 Alb. L. J. 276.

⁶ Cain v. Hanna, 63 Ind. 408.

⁷ Code, 1873, & R. Code 1880, §§ 1941, 1942.

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495. Kansas. — Mortgages proved or acknowledged and certified according to law are recorded in the office of the register of deeds of the county in which the real estate is situated. The filing of deeds with the register for record is notice to all persons. They are not valid, except between the parties and as to persons having actual notice, until they are deposited for record. If executed under powers of attorney, these must be recorded at the same time.¹ A deed absolute in form, but intended to be defeasible, is not affected as against any person other than the grantee, or his heirs or devisees, or persons having actual notice, unless the instrument of defeasance is recorded after due acknowledgment.²

496. Kentucky. — No deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, is valid against a purchaser for a valuable consideration without notice, or against creditors, until acknowledged or proved according to law, and lodged for record. The record is made in the clerk's office of the county in which the property, or the greater part of it, is situated. All *bond fide* deeds of trust or mortgage take effect in the order in which they are acknowledged or proved and lodged for record.³ If executed by an attorney under a power, the record of the mortgage is not constructive notice unless the power of attorney be also recorded.⁴ Although not recorded, a mortgage or deed of trust prevails in equity against a creditor who had notice of it before he acquired a legal title to the mortgaged property.⁵

497. Louisiana. — Mortgages must be recorded in the mortgage book of the parish where the property is situated. If not publicly inscribed on the records they do not prejudice third persons; but neither the contracting parties, nor their heirs, nor those who were witnesses to the act by which the mortgage was stipulated, can take advantage of the non-inscription of the mortgage. The registry preserves the evidence of mortgages during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made.⁶ The object of the reinscription is

¹ Dassel's Stat. 1876, c. 22, §§ 19-24.

² Ib. c. 68, § 2.

³ Gen. Stat. 1873, p. 256.

⁴ Ib. p. 256; Graves v. Ward, 2 Duv. (Ky.) 301.

⁵ Forepaugh v. Appold, 17 B. Mon. (Ky.) 625, 631.

⁶ Rev. Civil Code, 1870, art. 3342-3370. As to the necessity of a separate record of mortgages, see Perot v. Cham-

to obviate the necessity of searching for mortgages more than ten years back. To effect it, a new description of the property is necessary ; and a mere reference to the previous mortgage is not sufficient.¹

498. Maine. — Mortgages are not effectual against any person, except the grantor, his heirs and devisees, and persons having actual notice, unless recorded in the registry of deeds for the county or district where the lands lie. A deed purporting to convey an absolute estate cannot be defeated by an instrument intended as a defeasance, as against any other person than the maker, his heirs and devisees, unless such instrument is recorded in the registry where the deed is recorded.²

499. Maryland. — A mortgage must be recorded within six months from its date in the county or city in which the land lies. When acknowledged and so recorded it takes effect as between the parties from its date ; otherwise it is not valid for the purpose of passing the title.³ Of two or more mortgages of the same land that which is first recorded according to law is preferred, if made in good faith and upon good and valuable consideration. If executed under a power of attorney, this must be recorded at the same time.⁴

A deed which by any other instrument or writing appears to have been intended only as a security in the nature of a mortgage, though absolute in terms, is considered a mortgage ; but the person for whose benefit the deed is made can have no benefit or advantage from the recording of it, unless the instrument or writing operating as a defeasance, or explanatory of its being

bers, 2 La. Ann. 800 ; Gillespie v. Cammack, 3 Ib. 248 ; Copley v. Dinkgrave, 7 Ib. 595 ; Cordeviolle v. Dawson, 26 Ib. 534 ; Fisher v. Tunnard, 25 Ib. 179 ; Verges v. Prejean, 24 Ib. 78. A re-inscription necessary after a lapse of ten years. See Barelli v. Delassus, 16 Ib. 280 ; Liddell v. Rucker, 13 Ib. 569 ; Batey v. Woolfolk, 20 Ib. 385 ; Kohn v. McHatton, 20 Ib. 223 ; Levy v. Mentz, 23 Ib. 261 ; Adams v. Dannis, 29 Ib. 315 ; Watson v. Bondurant, 30 Ib. 1 ; Succession of Gayle, 30 Ib. 351 ; Bondurant v. Watson, 103 U. S. 281.

Neither inscription nor re-inscription necessary as against the parties or their heirs. Cucullu v. Hernandez, 103 U. S. 105.

¹ Shepherd v. Orleans Cotton Press Co.

2 La. Ann. 100 ; Hyde v. Bennett, Ib. 799 ; Poutz v. Reggio, 25 Ib. 637.

² Rev. St. 1871, c. 73, §§ 8, 9.

³ If a mortgage is not recorded within six months from its date, it is nevertheless an equitable lien, and has priority over those who were general creditors at its date, but not over subsequent creditors. Sixth Ward Build. Ass'n v. Willson, 41 Md. 506 ; Pfeaff v. Jones, 50 Md. 263 ; Dyson v. Simmons, 48 Ib. 207.

Under art. 16, § 23 of Code of 1860, a valid record of a mortgage may be made after the expiration of six months from the date of the instrument, by decree or order of court. Pfeaff v. Jones, *supra*.

⁴ Code, 1860, art. 24, §§ 13-16, 25 ; R. Code, 1878, art. 44, §§ 16-19, 28, 34.

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designed to have the effect only of a mortgage or conditional deed, be also recorded with it.¹ Under this provision a neglect to record the defeasance does not annul and make void the deed, but the grantee loses thereby the benefit which the recording of it would have given him over subsequent purchasers. He derives no benefit from the record.²

The recording of a mortgage without the affidavit as to the truth and *bona fides* of the consideration required by statute³ does not operate as constructive notice.⁴

Assignments of mortgages may be recorded in the same manner as other conveyances, and the record is made constructive notice.⁵ This act does not affect equitable assignments made by a transfer of the mortgage debt.⁶

500. Massachusetts. — Mortgages and other conveyances of real estate must be recorded in the registry of deeds for the county or district where the lands lie. The conveyance is not valid and effectual against any person other than the grantor and his heirs and devisees, and persons having actual notice, unless so recorded.⁷ When a deed purports to contain an absolute conveyance of any estate in lands, but is made or intended to be made defeasible by a deed of defeasance, bond, or other instrument, for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance is recorded in the registry of deeds for the county or district where the lands lie.⁸ The instrument of defeasance has full effect between the parties without being recorded.⁹

501. Michigan. — Mortgages are recorded in the office of the register of deeds for the county where the land lies. They are entered in separate books kept for that purpose. If not recorded they are void against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. A deed absolute in terms, but intended to be made defeasible by force of a deed of defeasance or other instrument

¹ R. Code, 1878, art. 66, § 42.

² *Owens v. Miller*, 29 Md. 144.

³ See § 344.

⁴ *Reiff v. Eshleman*, 52 Md. 582.

⁵ Act 1868, c. 373.

⁶ *Byles v. Tome*, 39 Md. 461.

⁷ Gen. Stat. 1860, c. 89, §§ 1, 3.

⁸ *Ib.* § 15. It would seem that the instrument of defeasance need not be acknowledged before being recorded. *Stetson v. Gulliver*, 2 Cush. 494, 497; but see *Dole v. Thurlow*, 12 Met. 157, 163, per Shaw, C. J.

⁹ *Bayley v. Bailey*, 5 Gray, 505, 510.

for that purpose, is not defeated or affected thereby, as against any person other than the maker, his heirs or devisees, or persons having actual notice, unless the defeasance is recorded.¹

502. Minnesota. — Mortgages must be recorded in the office of the register of deeds for the county where the land is situated; and if not so recorded are void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded, or as against any attachment or judgment obtained at the suit of any person against the person in whose name the title to the land appears of record. When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice, unless the instrument of defeasance is recorded.²

503. Mississippi. — Deeds of trust and mortgages are void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged or proved, and lodged with the clerk of the chancery court of the county in which the lands are situate, to be recorded; but as between the parties and their heirs, and as to all subsequent purchasers with notice, or without valuable consideration, they are, nevertheless, valid and binding. Deeds of trust and mortgages take effect and are valid only from the time they are delivered to the clerk to be recorded.³

All instruments conveying both real estate and personal property, as growing crops, must be recorded in the regular deed books of the proper county, and also in a chattel deed book.⁴

504. Missouri. — Mortgages must be recorded in the office of the recorder of the county in which the real estate is situated. From the time of filing with the recorder for record, the instrument imparts notice to all persons of its contents. Until so deposited it is not valid, except between the parties, and as to such as have actual notice.⁵

¹ Compiled Laws, 1871, pp. 1345, 1346; *creditors of, the grantor, not to remote*
Acts 1879, p. 284, No. 262. *purchasers or creditors. Mississippi Val-*

² R. S. 1866, pp. 330, 331; Laws 1875, *ley Co. v. Chicago, St. L. & N. O. R. R.*
c. 51; G. S. 1878, c. 40, §§ 21, 23. *Co. 58 Miss. 846.*

³ R. Code, 1871, p. 503; R. Code, 1880, ⁴ Laws 1876, p. 100.

§§ 1209, 1212, 1213. The statute has ⁵ Wagner's Stat. 1872, p. 277; 1 R. S.
reference solely to purchasers from, and 1879, c. 20 §§ 691-694.

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505. Montana Territory. — Mortgages and other conveyances are recorded in the office of the recorder of the county where the real estate is situated, but are valid and binding between the parties without such record. Every such recorded instrument, from the time of filing the same for record, imparts notice to all persons of its contents, and subsequent purchasers and mortgagees are deemed to purchase and take with notice. If not so recorded, it is void as against any subsequent purchaser in good faith and for a valuable consideration, whose own conveyance is first recorded.¹

506. Nebraska. — Mortgages are recorded with the county clerks, who are *ex-officio* registers of deeds, in the county in which the real estate or any part of it is situated; but in case the county is not organized, then in the county to which it is attached for judicial purposes. Mortgages and absolute deeds, intended to operate as such, must be recorded in books kept for the purpose.² The deed is considered as recorded from the time it is delivered to the clerk for that purpose; and takes effect from that time, and not before, as to all creditors and subsequent purchasers in good faith without notice; but as between the parties is valid without record.³ A deed which appears by any other instrument in writing to be intended only as a security in the nature of a mortgage, though absolute in terms, is considered as a mortgage; but the person for whose benefit such deed is made does not derive any advantage from the recording of it, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith and at the same time.⁴

507. Nevada. — A mortgage, to operate as notice to third persons, must be recorded in the office of the recorder of the county in which the real estate is situated, but is valid and binding between the parties without such record. From the time of filing for record, it imparts notice to all persons of its contents. Subsequent purchasers and mortgagees have constructive notice of all properly recorded conveyances.⁵

508. New Hampshire. — Mortgages and other conveyances

¹ Codified Stat. 1872, pp. 400, 401. •

⁴ *Ib.* p. 390.

² G. S. 1873, c. 13, §§ 44, 48; Compiled Stats. 1881, pp. 185, 186, 389, 390.

⁵ Compiled Laws, 1873, §§ 252, 254; *Grellet v. Heilshorn*, 4 Nev. 526.

³ Compiled Stats. 1881, p. 389.

are recorded in the registry of deeds in the county in which the lands lie. A deed may be recorded though not acknowledged, and for sixty days after such recording it is as effectual as if duly acknowledged.¹ Every conveyance of lands, made for the purpose of securing the payment of money or the performance of any other thing stated in the condition of it, is a mortgage; but the conveyance cannot be defeated, or the estate incumbered, by any agreement, unless it is inserted in the condition of the conveyance, and made part of it, and the condition must state the sum of money secured, or other thing to be performed.²

509. New Jersey. — Mortgages are recorded in the office of the clerk of the court of common pleas for the county in which the lands lie. If any deed be expressed in absolute and unconditional terms, but it appears by any other writing to have been intended by way of a mortgage, the deed is considered and registered as such; but the grantee is not entitled to the benefits and advantages given by means of the record to a mortgagee, unless an abstract of the writing operating as a defeasance of the deed, or explanatory of the intention of the parties that it should have the effect of a mortgage, be also registered with it.³

A mortgage has no effect against a subsequent judgment creditor, or *bond fide* purchaser, or mortgagee, for a valuable consideration without notice, unless so recorded at or before the time of such judgment, or of lodging with the clerk for record of such subsequent mortgage or conveyance. As between the parties the mortgage is valid and operative without record.

This statute applies as against the state itself. It makes no reservation or exception in favor of the state. Therefore a prior mortgage to the state, not recorded until after the recording of a subsequent mortgage to one who took it in good faith without notice, is postponed to the latter.⁴

510. New Mexico Territory. — Conveyances of real estate are registered in the office of the archives of the county in which the land lies. The makers of such instruments, after having signed, certified, and registered them, must give notice of the time of registration in the office of the register to all persons mentioned therein; and all purchasers and mortgagees are con-

¹ G. S. 1867, c. 121, §§ 1-7; G. L. 1878, c. 135, §§ 1-7.

² G. S. 1867, c. 122, §§ 1, 2; G. L. 1878, c. 136, § 2.

³ Nixon's Dig. 1868, pp. 147, 611; Rev. 1877, pp. 705, 706. And see *Den v. Wade*, 20 N. J. L. 291.

⁴ *Clement v. Bartlett*, 33 N. J. Eq. 43.

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sidered in law and equity to have purchased under such notice. The deed is not valid except to the parties interested, and those who have actual notice of the same, until it is deposited in the office of the clerk to be registered.¹

511. **New York.** — Mortgages and other conveyances of real estate are recorded in the office of the clerk of the county where the real estate is situated; or in New York, and some other counties, in the office of the register; and every such conveyance not so recorded is void as against a subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first duly recorded. Separate books are kept in which all mortgages, and all conveyances absolute in terms but intended as mortgages, are recorded.

Every deed which appears to have been intended only as a security in the nature of a mortgage, though absolute in terms, is considered a mortgage; but a person for whose benefit the deed is made can derive no advantage from the record of it, unless every writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed, be also recorded therewith, and at the same time.²

512. **North Carolina.** — No deed of trust or mortgage of real estate is valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies.³ Under this provision it is held that no notice, however formal and complete, can supply the place of registration. A deed of trust or mortgage is of no validity whatever, either in law or equity, as against purchasers for value and creditors, until duly registered. It takes effect only from and after the registration.⁴

513. **Ohio.** — Mortgages are recorded in the office of the recorder of the county in which the premises are situated, and take effect from the time when the same are delivered to the recorder for record; and if two or more are presented for record

¹ G. L. 1880, c. 44, §§ 14-16.

As to the Spanish and Mexican law of registration prevailing in this territory at the date of the treaty of Guadalupe Hidalgo, see *Moore v. Davey*, 1 N. Mexico, 303.

² *Fay's Dig. of Laws*, 1876, vol. 1, p. 580; 2 R. S. 1875, p. 1138.

³ *Battle's Revisal*, 1873, c. 35, § 12.

⁴ *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. (N. C.) Eq. 584; *Leggett v. Bullock*, Busb. (N. C.) L. 283; *King v. Portis*, 77 N. C. 25.

on the same day, they take effect in the order of presentation for record.¹ Other deeds must be recorded within six months from their date.² Separate record books are kept for the recording of mortgages, deeds of trust, and powers of attorney for their execution.³

Under this statute mortgages take effect in the order of their delivery for record, although a junior mortgagee has actual notice of the existence of a prior unrecorded mortgage. The statute wholly excludes the doctrine of notice, and makes priority wholly dependent upon the order of record.⁴

514. Oregon. — Every conveyance not recorded by the county clerk in the county where the lands lie within five days is void against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance is first duly recorded. Separate books are kept for the record of mortgages. When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual knowledge of it, unless the instrument of defeasance has been recorded in the office for the recording of deeds and mortgages of the county where the lands lie.⁵

515. Pennsylvania. — It is provided that no mortgage, or defeasible deed in the nature of a mortgage, shall be good or sufficient to convey or pass any freehold, or inheritance, or estate for life or years, unless it is recorded in the office for recording deeds for the county within six months after its date.⁶ But it is held that an unrecorded mortgage is not wholly inoperative. It is good against the mortgagor and subsequent incumbrancers with notice; and a mortgage for purchase money is good against a

¹ R. S. S. & C. c. 34, § 7; G. S. 1880, § 4133. See *Sturges v. Bank of Cleveland*, 3 McLean, 140.

² *Ib.* § 8

³ *Ib.* § 28. This provision is directory merely. *Smith v. Smith*, 13 Ohio St. 532.

⁴ *Mayham v. Coombs*, 14 Ohio, 428; *Stansell v. Roberts*, 13 *Ib.* 148; *Bercaw v. Cockerill*, 20 Ohio St. 163, and cases cited. See Declaratory Act of March 16, 1838, S. & C. 469. See § 573.

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⁵ G. L. 1872, pp. 518, 519.

⁶ *Brightly's Dig.* 1872, p. 477. This provision was first enacted in 1715, for the protection of subsequent mortgagees and others from loss by secret pledges of property. The six months allowed are calendar months. *Brudenell v. Vaux*, 2 Dall. 302. By recent statute, applicable to Philadelphia alone, deeds and other conveyances are valid as against subsequent purchasers only from the date of record. *Pardon's Ann. Dig.* p. 2110, § 5.

judgment creditor with actual notice before his debt was contracted.¹ If the mortgage remain unrecorded at the time of the death of the mortgagor, though good against him while he lived, it is not good against his creditors after his decease, but must then come in with his general debts.²

With the exception of mortgages for purchase money, no mortgage is a lien until left for record; but when recorded, the priority of lien is according to the priority of record.³ It is the duty of the recorder to indorse the time upon the mortgage when left for record, and to number it; and if two or more deeds are left on the same day, they have priority according to the time they were left at the office for record.⁴

A mortgage for purchase money, if recorded within sixty days from its execution, has priority.⁵ Of two mortgages for purchase money recorded within the sixty days, that which is first recorded has priority.⁶

No defeasance to any deed of real estate, regular and absolute upon its face, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged, and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated within sixty days from the execution thereof; and such defeasances shall be recorded and indexed as mortgages by the recorder.⁷

516. Rhode Island. — All deeds of trust, mortgages, and other conveyances of real estate, are void unless acknowledged and recorded in the office of the town clerk of the town where the lands lie. As between the parties and their heirs they are, however, valid and binding without record.⁸ A bond of defeasance or other instrument which may cause any deed to operate as a mortgage must be recorded; otherwise the deed does not operate as a mortgage against any person who may *bona fide* and without notice of such incumbrance purchase the real estate conveyed by such deed

¹ Nice's Appeal, 54 Pa. St. 200; Mellon's Appeal, 32 Pa. St. 121; Britton's Appeal, 45 Pa. St. 172; Speer v. Evans, 47 Pa. St. 141; Lahr's Appeal, 90 Pa. St. 507.

² Nice's Appeal, 54 Pa. St. 200; Adams's Appeal, 1 Penn. 447.

³ Brooke's Appeal, 64 Pa. St. 127; Foster's Appeal, 3 Pa. St. 79; Brightly's Dig. 1872, p. 478.

⁴ Brooke's Appeal, 64 Pa. St. 127.

⁵ Dig. *supra*, p. 478; Bratton's Appeal, 8 Pa. St. 164; Parke v. Neeley, 90 Pa. St. 52.

⁶ Dungan v. Am. L. Ins. & Trust Co. 52 Pa. St. 253.

⁷ Laws 1881, p. 84.

⁸ Gen. Stat. 1872, p. 350.

of the person to whom the same was made; and the person entitled to the defeasance is barred of all right of redemption against such second purchaser.¹

517. South Carolina. — All deeds of trust, or instruments in writing, conveying real estate, and creating a trust or trusts in regard to such property, or charging or incumbering the same; all mortgages or instruments in writing, in the nature of a mortgage of any property; all statutory liens on crops; all statutory liens on buildings and lands for labor furnished or performed on them; and generally all instruments in writing now required by law to be recorded are valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of register of mesne conveyances of the county where the property affected thereby is situated; but the above mentioned deeds or instruments in writing, if recorded subsequently to the expiration of said period of forty days, are valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record.²

When the same lands are mortgaged at different times, the debts meant to be secured by such mortgages must be paid in the order the same are recorded.³

518. Tennessee. — Mortgages and other conveyances of real estate are registered in the county where the land lies, unless it lies partly in two counties, when it may be registered in either; but if it consists of separate tracts, the deed must be registered in each of the counties where any of the tracts lie. The deed has effect between the parties to it, their heirs and representatives, without registration; but as to other persons not having actual notice, it has effect only from the noting for registration on the books of the register. Priority of registration determines priority of right. A conveyance not recorded is void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice.⁴

519. Texas. — Mortgages and deeds of trust are recorded within the county where the lands are situated, in the office of the clerk of the county court. They take effect and are valid as to all subsequent purchasers for a valuable consideration without

¹ G. S. 1872, p. 355.

² Acts 1876, p. 92.

³ R. S. 1873, p. 424.

⁴ Code, 1858, §§ 2032, 2071-2075.

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notice, and as to all creditors, from the time when so duly recorded; but as between the parties and their heirs, and as to purchasers with notice, or without valuable consideration, they are valid and binding without being recorded.¹

Mortgages, deeds of trust, and other instruments intended to create a lien are recorded in separate books kept for the purpose.²

520. Utah Territory. — Mortgages and other conveyances of land are recorded in the office of the county recorder for the county where the lands are situate. They must be attested by at least one witness, and must be duly proved or acknowledged.³

521. Vermont. — Mortgages and other conveyances of real property are recorded in the clerk's office of the town in which the lands lie. Unless so recorded, they are not good or effectual in law to hold the lands against any other person but the grantor and his heirs only. When a deed is made by virtue of a power of attorney this must also be recorded, or the deed is without effect and is inadmissible in evidence.⁴

522. Virginia. — Deeds of trust and mortgages are void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that they are duly admitted to record in the county or corporation wherein the property may be; or, when the property is within the jurisdiction of a corporation or hustings court, are recorded in the clerk's office of such court. Deeds other than mortgages and deeds of trust, when recorded within sixty days from the day of acknowledgment, are as valid as to creditors and subsequent purchasers as if recorded on the day of such acknowledgment. When two or more deeds are recorded on the same day, that which is first admitted to record has priority.⁵

523. Washington Territory. — Deeds and mortgages are recorded in the office of the auditor of the county where the land is situated, and are valid as against *bond fide* purchasers from the date of the filing of them for record. The record is notice to all the world.⁶

524. West Virginia. — Deeds of trust and mortgages are void as to creditors and subsequent purchasers for a valuable consideration without notice, until and except from the time they are

¹ Paschal's Dig. arts. 4988, 4994; R. S. 1879, arts. 4332-4334; Cavanaugh v. Peterson, 47 Tex. 197.

² R. S. 1879, art. 4304.

³ Laws 1855, c. 75; and see Laws 1867, c. 28; Compiled Laws, 1876, p. 254.

⁴ Gen. Stat. 1870, pp. 448, 451.

⁵ Code, 1873, c. 114, §§ 4-9.

⁶ Laws 1877, p. 312.

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duly admitted to record in the county where the property is situated. If two or more writings embracing the same property are admitted to record in same county on the same day, that which was first admitted to record has priority.¹

525. Wisconsin. — Every conveyance not recorded in the office of the register of deeds for the county in which the land lies is void as against any subsequent purchaser, in good faith and for a valuable consideration, whose conveyance shall first be duly recorded.² When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall also have been duly recorded.³

526. Wyoming Territory. — Mortgages and other conveyances are recorded in the office of the register of deeds of the county where the land lies within three months of the date of the instrument. The instrument, when recorded, is notice to, and takes precedence of, any subsequent purchaser or purchasers, from the time of delivering the instrument at the office of the register of deeds for record.⁴

When a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible by force of a deed of defeasance, or other instrument for that purpose, the original conveyance is not thereby defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance has been recorded in the office of the register of deeds for the county where the lands lie.⁵

3. Requisites as to Execution and Acknowledgment.

527. Generally. — The first requisite to the valid record of any instrument is that it shall be executed according to law. If defectively executed, it is not generally entitled to be recorded; but even if it is recorded it is not constructive notice, so as to vest in the grantee or mortgagee any interest in the premises as against subsequent purchasers in good faith without notice. Thus

¹ Code, 1870, c. 74, §§ 5, 8.

² R. S. 1878, p. 641, § 2241.

³ *Ib.* § 2243.

⁴ Compiled Laws, 1876, c. 40.

⁵ *Ib.* c. 3, § 16.

a mortgage executed and recorded with the name of the grantee omitted does not impart constructive notice of the existence of the mortgage.¹ As between the parties, as already noticed, equity will give the instrument effect according to the intention of the parties.² If a mortgage defectively executed be afterwards reformed, it will not affect the lien of one who has in the mean time purchased in good faith, and, according to some authorities, will not affect a lien obtained in the mean time by an attachment, or judgment, or a levy of execution.

Inasmuch as the registration of a mortgage is solely for the benefit and protection of the mortgagee, and rests wholly in his election, he cannot, in the absence of an agreement express or implied to the contrary, hold the mortgagor liable for the registration fees.³

528. Description.—The description of the property upon which the mortgage is an incumbrance must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any incumbrance upon it.⁴ If a subsequent mortgagee or purchaser has notice of a mistake in the description of a prior mortgage, as, for instance, that the lot was described as number "eighteen," when "eight" was the correct number of it, such mortgagee or purchaser will take subject to the prior, in the same way that he would had the description been correctly given;⁵ and the subsequent mortgagee has constructive notice of the mortgage as it was intended to be given, when the premises are well defined and well known to the parties, and a notice on the margin of a prior defective mortgage referred to a prior deed in which the land was correctly described.⁶

A mortgage described certain lots by a town plat which was not recorded, but a plat was subsequently recorded upon which the same lots were described by different numbers. It was held that the absence from the record of the town plat at the time of recording the mortgage was not enough to put the purchaser

¹ *Disque v. Wright*, 49 Iowa, 538; S. C. 13 West. Jur. 34, 158.

² *Van Thorniley v. Peters*, 26 Ohio St. 471.

³ *Simon v. Sewell*, 64 Ala. 241.

⁴ See §§ 65, 66; *Barrows v. Baughman*, 9 Mich. 213; *Rodgers v. Kavanaugh*, 24 Ill. 583; *Eggleston v. Watson*, 53 Miss.

339; *Port v. Embree*, 54 Iowa 14. See, also, *Ripley v. Harris*, 3 Biss. 199, as to the interest in the land mortgaged.

⁵ *Warburton v. Lauman*, 2 Greene (Iowa), 420.

⁶ *Bent v. Coleman*, 89 Ill. 364; S. C. 7 Reporter, 366.

upon inquiry, and make him chargeable with these facts; and that therefore he was not affected with constructive notice of the mortgage.¹

529. Apparent error in description. — When a description in a mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the mortgage upon the lot intended to be described.² And so the record of a deed, describing the premises by an impossible sectional number, is sufficient to put a purchaser from the same grantor upon inquiry, and may charge him with notice of the grant actually made or intended to be made.³

But although a mistake in description be such that the mortgage lien would be invalidated as against a subsequent purchaser, yet it has been held that a subsequent judgment lien will not for this reason become a paramount lien upon the land intended to be described.⁴ Even where a parcel of land which the parties intended to include in the mortgage was wholly omitted in the description, the deed may be reformed in chancery, and the omitted tract included in the mortgage free from any judgment lien which has in the mean time attached to the debtor's real estate.⁵

530. Signing. — The record of a mortgage, without the signature of the mortgagor is not constructive notice, though the mortgage was in fact signed, but the signature was omitted by mistake from the record.⁶ A signature is binding if made at the proper time and duly acknowledged, whether signed by the person owning the name, or by some one else with his consent.⁷

If the name of the mortgagee be by mistake written in the blank for the mortgagor, and the name of the mortgagor in that left for the mortgagee, but is signed by the right party and purports to secure a debt from the party signing to the other, and is acknowledged by the party signing, the mistake in the transposition of the names of the parties being palpable, its record will be notice to subsequent purchasers from the mortgagor of the mistake.⁸

¹ *Stewart v. Huff*, 19 Iowa, 557.

² *Anderson v. Baughman*, 7 Mich. 69; *Tousley v. Tousley*, 5 Ohio St. 78.

³ *Merrick v. Wallace*, 19 Ill. 486, 498.

⁴ *Welton v. Tizzard*, 15 Iowa, 495; *Swarts v. Stees*, 2 Kans. 236; *Gillespie v. Moon*, 2 Johns. (N. Y.) Ch. 584, per

Kent, Chancellor; *White v. Wilson*, 6 Blackf. (Ind.) 448.

⁵ *White v. Wilson*, *supra*; § 99.

⁶ See § 81; *Shepherd v. Burkhalter*, 13 Ga. 443.

⁷ *Johnson v. Van Velsor*, 43 Mich. 208.

⁸ *Beaver v. Slanker*, 94 Ill. 175, 176.

531. Requirement of seal. — A mortgage, like other conveyances, must generally be executed under seal to entitle it to be recorded.¹ In several states the use of a seal has been wholly dispensed with by statute. In others a scroll is given the same effect as a seal. But where the use of a seal or of its equivalent is required, an instrument purporting to be a mortgage, but not executed under seal, is not entitled to be recorded; and if it be copied into the records, it does not impart notice to subsequent purchasers or incumbrancers.² Such an instrument, however, will operate as an equitable mortgage, and will prevail against a subsequent agreement to give a mortgage.³

If the instrument was sealed at the time of its execution, the subsequent detachment of the seal does not invalidate it, unless it be proved that the seal was detached before the instrument reached the clerk's office for record; and the burden of such proof is upon the party who attacks the validity of the instrument.⁴

532. Requirement of witnesses. — The record of a mortgage not executed in compliance with a statute requiring that it shall be attested by two witnesses is not constructive notice,⁵ though the defect be not apparent on the face of the instrument, one of the witnesses being the grantor's wife.⁶ Upon the same principle the record of a mortgage acknowledged before one justice of the peace, when a statute required it to be made before two justices, does not operate as notice.⁷ But a mortgage attested by one witness under such a statute is good in equity between the parties,⁸ and as against all others whether purchasers or creditors, who had actual notice of the existence of the mortgage.⁹ When a statute provides that a deed, to be recordable,

¹ See § 81; *Hebron v. Centre Harbor*, 11 N. H. 571; *Bowers v. Oyster*, 3 Pa. 239; *In re St. Helen Mill Co.* 3 Sawyer, 88. And see *Woods v. Wallace*, 22 Pa. St. 171; *Hughes v. Tong*, 1 Mo. 389; *Moore v. Madden*, 7 Ark. 530.

² *Racouillat v. Sansevain*, 32 Cal. 376; *Racouillat v. Rene*, 32 Cal. 450.

³ *Portwood v. Outton*, 3 B. Mon. (Ky.) 247.

⁴ *Van Riswick v. Goodhue*, 50 Md. 57.

⁵ See § 82; *Thompson v. Morgan*, 6 Minn. 292; *Harper v. Barsh*, 10 Rich. (S. C.) Eq. 149; *New York Life Ins. & Trust Co. v. Staats*, 21 Barb. (N. Y.) 570; *Van*

Thorniley v. Peters, 26 Ohio St. 471; *Gardner v. Moore*, 51 Ga. 268; *Ross v. Worthington*, 11 Minn. 438; *White v. Denman*, 16 Ohio, 59; S. C. 1 Ohio St. 110; *Hodgson v. Butts*, 3 Cranch, 140; *Frostburg Mut. Build. Asso. v. Brace*, 51 Md. 508; *Potter v. Strausky*, 48 Wis. 235.

⁶ *Carter v. Champion*, 8 Conn. 549.

⁷ *Dufphey v. Frenaye*, 5 St. & P. (Ala.) 215; and see *Munn v. Lewis*, 2 Port. (Ala.) 24.

⁸ *Moore v. Thomas*, 1 Oregon, 201; *Hastings v. Cutler*, 24 N. H. 481.

⁹ *Sanborn v. Robinson*, 54 N. H. 239; *Hastings v. Cutler*, *supra*.

shall be attested by two witnesses, and a mortgage so witnessed was by mistake recorded without any copy of the attestation, it was held that the registry was not constructive notice. The recording of the instrument not being in compliance with the law, the registration is a mere nullity; and a subsequent purchaser is affected only by such actual notice as would amount to a fraud.¹

533. Acknowledgment or proof a prerequisite. — The recording acts generally prescribe certain formalities in the execution of a deed which must be complied with to entitle it to be recorded. An acknowledgment or proof of the deed before some officer is an essential prerequisite. Without an acknowledgment, or with one that is defective, the record of the deed is unauthorized and is not constructive notice.² It has been held, however, that where an acknowledgment is in due form, the only defect in it being a latent one, as, for instance, being taken by the officer out of his jurisdiction, the record of the mortgage is notice to subsequent purchasers in favor of one holding an assignment of the mortgage duly recorded.³ The purpose of this requirement is to insure the authenticity of the instrument before admitting it of record. The certificate must be made and attested substantially in the form given by statute; or, where no special form is prescribed, then in accordance substantially with the provisions of the statute respecting it; but it need not be in the exact words of the form or of the statute.⁴ But in aid of the certificate reference may be had⁵ to the instrument itself, or to the certificate of the recorder, as, for instance, to fix the date of acknowledgment, in compliance with a statute providing that the certificate of acknowledgment shall contain the time when it is taken.⁶ When a statute requires the acknowledgment of a married woman to be taken separate and apart from her husband, the record is no notice of a lien on her estate unless the acknowledgment is so taken.⁷

¹ *Pringle v. Dunn*, 37 Wis. 449.

² See § 83; *Blood v. Blood*, 23 Pick. (Mass.) 80; *Wood v. Cochrane*, 39 Vt. 544; *Frost v. Beekman*, 1 Johns. (N. Y.) Ch. 288; *Work v. Harper*, 24 Miss. 517; *Dufphey v. Frenaye*, 5 St. & P. (Ala.) 215; *Parret v. Shaubhut*, 5 Minn. 323; *Jacoway v. Gault*, 20 Ark. 190; *White v. Denman*, 1 Ohio St. 110; *Bishop v. Schneider*, 46 Mo. 472; *Jones v. Berkshire*, 15 Iowa, 248; *Todd v. Outlaw*, 79 N. C. 235; and see *White & Tudor's*

Lead. Cas. in Eq. 4th Am. ed. vol. 2d, pt. 6, p. 206; *Irwin v. Welch*, 10 Neb. 479.

³ *Heilbrun v. Hammond*, 13 Hun (N. Y.), 474.

⁴ *Alvis v. Morrison*, 63 Ill. 181; *Meriam v. Harsen*, 2 Barb. (N. Y.) Ch. 232; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561; *Allen v. Lenoir*, 53 Miss. 321.

⁵ *Carpenter v. Dexter*, 8 Wall. 513.

⁶ *Kelly v. Rosenstock*, 45 Md. 389.

⁷ *Armstrong v. Ross*, 20 N. J. Eq. 109.

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If the acknowledgment be by an agent, the certificate should show with reasonable clearness that the acknowledgment was made on behalf of the constituent or as being his deed.¹ A mortgage recorded without having been acknowledged creates no valid lien as against creditors and subsequent purchasers, whether they have actual notice of the mortgage or not ; but it is good as between the parties, and on breach of the condition of payment may be enforced against the mortgagor, and on his death against his administrator, in preference to his general creditors.²

534. The officer must be duly appointed and qualified. The registration of a mortgage, acknowledged or proved before an officer who has not been duly appointed or qualified, has no effect in rendering it operative against subsequent purchasers.³ It is equally necessary that the officer should act within the limits of his jurisdiction.⁴ A judge, or commissioner, or other officer empowered to take an acknowledgment, cannot act out of the state for which he was appointed.⁵

When, however, acknowledgments made before an officer not authorized to act are by statute declared to be good and effectual, in the same way that they would have been had they been taken and certified by an officer properly qualified, one purchasing after such statute has gone into effect is bound to take notice of the conveyance, though until that time the record would be notice to no one.⁶

535. Taking an acknowledgment is a ministerial act ; therefore it may be done by one who is so related to the parties as to be disqualified as a judge or juror.⁷ It has been held that a married woman may acknowledge a mortgage of her separate estate before her husband, he being a justice of the peace.⁸ But

¹ *McDaniels v. Flower Brook Manufg Co.* 22 Vt. 274.

² *Haskill v. Sevier*, 25 Ark. 152 ; *Main v. Alexander*, 9 Ark. 112.

³ *Suddereth v. Smyth*, 13 Ired. (N. C.) L. 452 ; *Worsham v. Freeman*, 34 Ark. 55.

⁴ *Jackson v. Colden*, 4 Cow. (N. Y.) 266.

⁵ *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498. A certificate of acknowledgment in which the officer describes himself as "a justice of the peace within and for said county," no county being named, except that in the body of the deed, where

both the grantor and grantee resided, is not necessarily invalid. *Beckel v. Petticrew*, 6 Ohio St. 247 ; *Fuhrman v. London*, 13 S. & R. (Pa.) 386.

⁶ *Journey v. Gibson*, 56 Pa. St. 57.

⁷ *Lynch v. Livingston*, 6 N. Y. 422 ; *Truman v. Lore*, 14 Ohio St. 144 ; *Williamson v. Carskadden*, 36 Ohio St. 664. In other cases it is declared that the officer acts judicially. *Homœopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103 ; *Williams v. Baker*, 71 Pa. St. 476 ; *Heeter v. Glasgow*, 79 Pa. St. 79.

⁸ *Kimball v. Johnson*, 14 Wis. 674.

REQUISITES AS TO EXECUTION AND ACKNOWLEDGMENT. [§§ 536-538.

a trustee in a deed of trust cannot take a valid acknowledgment of it.¹

536. In like manner, when a statute requires that a certificate of the official character of the officer before whom the acknowledgment was made shall accompany the certificate of acknowledgment, the filing of the mortgage for record without the latter certificate does not constitute a record of it. If, however, this certificate is subsequently obtained and recorded in the registry where the deed is recorded, the mortgage will be treated as recorded from the date of the filing of this certificate.²

537. Upon the same principle, also, when a statute requires that the officer shall certify that he is personally acquainted with the party making the acknowledgment, the omission so to do renders null the acknowledgment and the record.³ The requirement must be substantially complied with.⁴ If the officer taking the acknowledgment certifies that he knows the parties by whom the instrument purports to be executed, when in fact he did not, his certificate, though *prima facie* valid, upon proof of this fact, is a nullity, both as entitling the paper to be recorded and as affording any proof of its execution, though in fact the instrument was acknowledged by the persons who executed it.⁵ As between the parties themselves the mortgage would, of course, be valid upon proof of its execution and delivery.

A certificate of acknowledgment which simply describes the persons acknowledging as "grantors of the within indenture," without stating that they were known to the officer to be the same persons who are described in and who executed it, as prescribed by the statute, is insufficient to entitle the deed to be recorded.⁶

538. The certificate of acknowledgment is not conclusive ;

¹ Darst v. Gale, 83 Ill. 136.

² Reasoner v. Edmundson, 5 Ind. 393 ; Ely v. Wilcox, 20 Wis. 523.

³ Kelsey v. Dunlap, 7 Cal. 160 ; Peyton v. Peacock, 1 Humph. (Tenn.) 135. In this case, although the improper registration was not insisted upon by the answer, the court upon the exhibition of the deed took notice of the defect. See, also, Johnson v. Walton, 1 Sneed (Tenn.), 258 ; Bone v. Greenlee, 1 Cold. (Tenn.) 29 ; Thurman v. Cameron, 24 Wend. (N. Y.) 87 ; Livingston v. Kettelle, 1 Gil. (Ill.) 116.

⁴ Ritter v. Worth, 58 N. Y. 627 ; West

Point Iron Co. v. Reymert, 45 N. Y. 703 ; Troup v. Haight, Hopk. (N. Y.) 239.

⁵ Watson v. Campbell, 28 Barb. (N. Y.) 421. "This case," says Mr. Justice Ingraham, "shows the impropriety of a commissioner of deeds, in such an acknowledgment, certifying that he knows the parties, without any other knowledge than a mere introduction, or seeing the signature written. He thereby endangers the security, and exposes himself to liability for damages arising therefrom."

⁶ Fryer v. Rockefeller, 63 N. Y. 268.

but when it is correct in form, and is apparently executed by one authorized to act in the matter, and within his jurisdiction, it is sufficient to admit the deed to record, and is *prima facie* good.¹ It may be shown that the officer who made the certificate was not in fact authorized to act, or had become incompetent, or that he acted outside his jurisdiction.² It may be shown that the deed was never in fact executed or delivered.³ The presumption of regularity must, however, be first overcome.⁴ The officer is *prima facie* such as he is described to be, *de facto* and *de jure*. He is like an officer authorized to take testimony under a special commission. His return must stand until it is impeached by collateral proof. Until this is done his return is proof in itself of his official character, of his signature, and of his acting within his jurisdiction.⁵ The fact that he does not recollect the transaction does not affect his certificate.⁶

A mistake in the certificate of acknowledgment, whereby the grantee instead of the grantor appeared to be the person who made the acknowledgment, cannot be corrected in a court of equity, so as to give the record of the deed legal effect from the beginning, because it cannot be determined from the face of the instrument whether the error consisted in inserting the wrong name, or in taking the acknowledgment of the wrong man.⁷ A mistake in the date of an acknowledgment may be shown and the true date established.⁸

As to the statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received.⁹ Under the statutes of some states for the special protection of the homestead right, it is required that the wife should acknowledge before the officer that she had released the homestead right.¹⁰ If, for instance, the certificate, shows that

¹ Jackson v. Schoonmaker, 4 Johns. (N. Y.) 161; Morris v. Keyes, 1 Hill (N. Y.), 540; People v. Snyder, 41 N. Y. 397.

² Lynch v. Livingston, 6 N. Y. 422.

³ Jackson v. Perkins, 2 Wend. (N. Y.) 308.

⁴ Johnson v. Van Velsor, 43 Mich. 208; Hourtienne v. Schnoor, 33 Mich. 274; Cameron v. Culkins, 44 Mich. 531.

⁵ Thurman v. Cameron, 24 Wend. (N.

Y.) 87, and cases cited; Canandarqua Academy v. McKechnie, 19 Hun (N. Y.), 62.

⁶ Tooker v. Sloan, 30 N. J. Eq. 394.

⁷ Wood v. Cochrane, 39 Vt. 544.

⁸ Hoit v. Russell, 56 N. H. 559.

⁹ Williamson v. Carskadden, 36 Ohio, St. 664.

¹⁰ As in Illinois both under Act of 1857 and that of 1869. Warner v. Crosby, 89

a married woman was examined separate and apart from her husband, and voluntarily relinquished her rights of dower and homestead in the lands, it cannot be impeached by evidence that there was no private examination; that she did not acknowledge the deed as her act and deed; that the contents of the deed were not made known to her; or that she did not release her homestead right. There must first be some allegation and proof of fraud or imposition practised upon her; or some fraudulent combination between the parties interested and the officer taking the acknowledgment.¹ There would be no certainty in titles if the officer's certificate could be contradicted by any other evidence. The law directs him to make his certificate in writing, and when he has made it the world is to look to that and to nothing else.² Parol evidence can only be admitted to show fraud or duress connected with the acknowledgment; not to contradict the officer's certificate.³

But it is held that the certificate of a magistrate to the deed of a married woman that she was of full age is not conclusive, and that she cannot ratify it after coming of age except by acknowledgment separate and apart from her husband.⁴

The exception that the magistrate's certificate is not conclusive of the facts stated in it when fraud is shown, does not, however, extend to the case of one who has in good faith purchased without notice of the fraud; he is protected by the record notwith-

Ill. 320; S. C. 11 Chicago L. N. 224. In *Indiana*, under Acts 1879, p. 129.

¹ *Heeter v. Glasgow*, 79 Pa. St. 79; *Singer Manufacturing Co. v. Rook*, 84 Pa. St. 442; *Graham v. Anderson*, 42 Ill. 514; *McPherson v. Sanborn*, 88 Ill. 150; *Monroe v. Poorman*, 62 Ill. 523; *Blackman v. Hawks*, 89 Ill. 512; S. C. 8 Cent. L. J. 196; *Jamison v. Jamison*, 3 Whart. (Pa.) 457; *Ridgely v. Howard*, 3 Harris & McHenry (Md.), 321; *Bissett v. Bissett*, 1 Ib. 211; *Hartley v. Frosh*, 6 Texas, 208; *Williams v. Pouns*, 48 Tex. 141; *M'Neely v. Rucker*, 6 Blackf. (Ind.) 391; *Coleman v. Smith*, 55 Ala. 368; *Miller v. Marx*, 55 Ala. 322; *Moore v. Fuller*, 6 Oregon, 272; *Lefebvre v. Dutruit*, 51 Wis. 326; *Johnson v. Van Velsor*, 43 Mich. 208; *Russell v. Baptist Theological Union*, 73 Ill. 337; *Insurance Company v. Nel-*

son, 103 U. S. 544; *Baldwin v. Snowden*, 11 Ohio St. 203; *Johnston v. Wallace*, 53 Miss. 331; *Kerr v. Russell*, 69 Ill. 666; *Crane v. Crane*, 81 Ill. 165; *Lowell v. Wren*, 80 Ill. 238.

² Per Tilghman, C. J., in *Jourdan v. Jourdan*, 9 S. & R. (Pa.) 268; and see *Graham v. Anderson*, 42 Ill. 514.

³ *Heeter v. Glasgow*, 79 Pa. St. 79; *Jamison v. Jamison*, 3 Whart. (Pa.) 457; *Homœopathic Mut. L. Ins Co. v. Marshall*, 32 N. J. Eq. 108.

In a note to this case by the reporter the decisions of the various states upon the question whether the officer's certificate is conclusively or only *prima facie* correct are fully cited.

⁴ *Williams v. Baker*, 71 Pa. St. 476; *Ledger Building Asso. v. Cook*, 7 Reporter, 409; S. C. 19 Alb. L. J. 281.

standing the fraud.¹ If he has actual knowledge of fraud or duress in obtaining a wife's acknowledgment to a deed, or knowledge of such circumstances as would naturally lead him to inquiry, he is deprived of the protection accorded to an innocent and *bond fide* holder. Even less than actual duress will avoid a wife's acknowledgment of a mortgage in the hands of an assignee who ought to have inquired for defences and did not. It is enough if it be shown that she did it under moral constraint, as, for instance, by threats, persecution, and harshness on the part of her husband. These facts being known to the mortgagee, his assignee is affected by them in case he is not entitled to the protection accorded to one who takes negotiable paper for value before maturity. He should inquire of the mortgagors whether the mortgage is open to any defence.²

A substantial compliance with the requirements of such a statute is sufficient.³

539. Delivery is another incident necessary to giving effect to the mortgage even as between the parties to it.⁴ Although the deed be recorded, if it has not been delivered, or the delivery was unauthorized, a subsequent conveyance by the mortgagor, or a subsequent judgment against him, will take precedence.⁵

The fact of the acknowledgment of the deed at a certain date is not by itself evidence that the mortgage was delivered at that time, or was ever delivered,⁶ though this has been said to be presumptive evidence.⁷ The record of the mortgage is said to be evidence of delivery in a greater degree, but it is not conclusive of a delivery. It has sometimes been spoken of as a *prima facie* evidence of delivery.⁸ It may be evidence for the jury to consider.⁹

But registration itself does not operate as a delivery ; nor does it supersede the necessity of proof of a delivery.¹⁰ A delivery of

¹ Heeter v. Glasgow, 79 Pa. St. 79 ; Goodsell v. Stinson, 7 Blackf. (Ind.) Hall v. Patterson, 51 Pa. St. 289. 437.

² McCandless v. Engle, 51 Pa. St. 309 ; ⁶ Freeman v. Schroeder, 43 Barb. (N. Michener v. Cavender, 38 Ib. 334, 337 ; Y.) 618 ; S. C. 29 How. Pr. 263 ; Jackson Twitchell v. McMurtrie, 77 Ib. 383. v. Richards, 6 Cow. (N. Y.) 617.

³ Hornbeck v. Mut. Building Asso. 88 ⁷ Wyckoff v. Remsen, 11 Paige (N. Pa. St. 64. Y.), 564.

⁴ Goodwin v. Owen, 55 Ind. 243 ; Hoad- ⁸ Kille v. Ege, 79 Pa. St. 15 ; Jackson ley v. Hadley, 48 Ind. 452 ; Freeman v. v. Perkins, 2 Wend. (N. Y.) 308.

Peay, 23 Ark. 439 ; Maynard v. Maynard, ⁹ Jordan v. Farnsworth, 15 Gray 10 Mass. 456. See § 84. (Mass.), 517.

⁵ Woodbury v. Fisher, 20 Ind. 387 ; ¹⁰ Hawkes v. Pike, 105 Mass. 560 ;

the mortgage to the register for record may be an effectual delivery to the mortgagee, where such delivery is made at the request of the mortgagee,¹ or the register had authority from him to receive it and keep it.

Delivery to a mortgagee who is called by a wrong name in the mortgage identifies the person intended to be secured, and vests the title in him.²

Of course, a delivery to an agent of the mortgagee is a delivery to the mortgagee himself; as, for instance, a delivery to the secretary of a railroad company is sufficient.³ A delivery of a mortgage made by a partner upon the dissolution of the firm to secure a note of the firm, which he has assumed, to the other partner, who is indemnified by the mortgage, is sufficient.⁴

Payment of the consideration of a mortgage may be a prerequisite to creating a valid lien. Thus, if one has notice of a prior unrecorded mortgage before he pays over money he has undertaken to loan upon a mortgage, the fact that he has recorded his own mortgage before receiving such notice does not make his mortgage the prior lien.⁵

540. Delivery after recording. — Although a mortgage is of no effect until there has been a delivery of it to the mortgagee, yet if it is made for a good consideration, as, for instance, an existing debt, and is filed for record without delivery, a subsequent acceptance of the deed by the mortgagee has been held to ratify the making and recording of it, and to give it legal effect from the time of filing, as against intermediate incumbrances.⁶ When, for instance, one in debt to a bank executed a mortgage to it, and without delivering it sent it to the record office to be recorded, and then sent word to the officers of the bank of the execution of the mortgage, and that they could get it of the recorder, and they replied that "they were glad it was done," this was held a sufficient delivery of the deed to the bank to pass the title as against one to whom the mortgagor made and delivered another mortgage of the same property two days afterwards, but after such notification to the bank and reply.⁷ There are cases which

Parker v. Hill, 8 Met. (Mass.) 447; *Foley v. Howard*, 8 Iowa, 56; *Houfes v. Schultze*, 2 Bradw. (Ill.) 196; S. C. 96 Ill. 335.

¹ *Dusenbury v. Halbert*, 2 Thomp. & C. (N. Y.) 177; *Thayer v. Stark*, 6 Cush. (Mass.) 11, 14.

² *Fisher v. Milmine*, 94 Ill. 328; *Beaver v. Slanker*, 94 Ill. 175.

³ *Patterson v. Ball*, 19 Wis. 243; *Truman v. McCollum*, 20 Ib. 360.

⁴ *Conwell v. McCowan*, 81 Ill. 285.

⁵ *Schultze v. Houfes*, 96 Ill. 335.

⁶ *Carnall v. Duval*, 22 Ark. 136.

⁷ *Farmers' & Mechanics' Bank v. Drury*, 38 Vt. 426.

hold that a delivery may be made to a stranger in behalf of the mortgagee, and without his authority, and upon his subsequent acceptance of the mortgage the title is regarded as having vested in him from the time of such delivery. Such was held to be the case where one in failing circumstances made a mortgage to a creditor who resided out of the state, without the knowledge of his creditor, and delivered it to his own attorney for the benefit of the creditor, with the request that the attorney should cause it to be recorded and handed to the creditor. The mortgage was accordingly recorded, and afterwards received and accepted by the mortgagee; but after the delivery of it to the attorney and the recording of it, but before the attorney had delivered it to the mortgagee, the property was attached by another creditor of the mortgagor's. It was held that the mortgaged estate immediately vested in the mortgagee, whose title was therefore superior to that of the attaching creditor.¹

It has been held, moreover, that it may be presumed that a mortgagee, in whose favor a mortgage has been executed and placed on record, will assent to it on being notified of its existence; and therefore, although it be made and recorded without his knowledge, and the land is afterwards attached by creditors of the mortgagor before the mortgagee has notice of the mortgage, which he afterwards assents to and ratifies, he may hold the mortgage lien against such attachments.²

541. When a subsequent delivery becomes operative. — Although a deed be inoperative at the time it is recorded, as when it is recorded before delivery, or is recorded as a deed when intended as a mortgage, and the statutes of the state where it is executed require that it shall be recorded in such case in separate mortgage books, upon a subsequent delivery in the one case, and in the other upon a purchase of the equity of redemption by the mortgagee, the record then becomes fully operative.³ The delivery of the deed, or the purchase of the equity of redemption, is equivalent to a delivery of the deed for record at that time, in the same way as when a deed is recorded in anticipation of the completion of a sale. The mortgage is effectual only from the time of such delivery, and any one who has in the mean time before the delivery obtained a lien upon the property has a prefer-

¹ *Merrills v. Swift*, 18 Conn. 257, and cases cited. This is doubtful law. See *Johnson v. Farley*, 45 N. H. 505; Jones on Chattel Mortgages, §§ 104-113.

² *Ensworth v. King*, 50 Mo. 477.

³ See §§ 85-87; *Warner v. Winslow*, 1 Sandf. (N. Y.) Ch. 430.

ence over such mortgagee. His assent to the mortgage makes the mortgage valid, and the record of it notice only from that time.¹ Where, for instance, a mortgage was recorded on the 13th day of May, 1870, and was held by the mortgagor ready for delivery when he should obtain a loan, and was not delivered until the 7th day of the following month, the latter date was held to be the date of its registry, as against one who in the mean time had acquired a mechanic's lien upon the property.

But if the mortgage be executed and acknowledged, and put upon record by the mortgagor, in pursuance of a prior contract for a loan upon it, which is afterwards made in pursuance of the contract, and the mortgage is then delivered upon the payment of the money, it has priority in equity over liens of mechanics and material-men, for work and materials furnished after the mortgage is recorded, for a building which the mortgagor commenced to erect upon the premises after the recording of the mortgage and before its delivery, the mortgagee having no knowledge of this fact. In such case the mortgage upon delivery has relation to the agreement for the loan, and the registry takes effect and becomes operative as constructive notice before the delivery, and from the time the mortgage was left for record.²

4. *Requisites as to the Time and Manner of Recording.*

542. The record is notice from the time of filing the deed for record. It is sometimes provided by statute that a mortgage or other deed shall be deemed to be recorded when it is filed for record, or noted in an entry book by the recorder as received. But aside from any statutory provision, the judicial interpretation of the effect of the filing is the same.³ The mortgage record dates from the moment it is left for record, and is indorsed by the recorder and entered upon the index or entry book, although it is not actually spread upon the record for months, or any

¹ *Foster v. Beardsley Scythe Co.* 47 Barb. (N. Y.) 505; *Jackson v. Richards*, 6 Cow. (N. Y.) 617; *Hood v. Brown*, 2 Ohio, 266; *Mut. Benefit Life Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Houfes v. Schultze*, 11 Chicago L. N. 75; S. C. 2 Bradw. (Ill.) 196.

² *Jacobus v. Mutual Benefit Life Ins. Co.* 27 N. J. Eq. 604. The doctrine of relation is fully considered in this case. See, also, *Pratt v. Potter*, 21 Barb. (N. Y.) 589; *Judd v. Seekins*, 62 N. Y. 266; S. C. 3 T. & C. 266. See *contra*, *Houfes v. Schultze* 11 Chicago L. N. 75; S. C. 2 Bradw. (Ill.) 196.

³ *Brooke's Appeal*, 64 Pa. St. 127; *Kessler v. State*, 24 Ind. 313; *Magee v. Beatty*, 8 Ohio, 396; *Brown v. Kirkman*, 1 Ohio St. 116; *Fosdick v. Barr*, 3 Ib. 471; *Bloom v. Noggle*, 4 Ib. 45; *Tousley v. Tousley*, 5 Ib. 78; *Bercaw v. Cockerill*, 20 Ib. 163. See §§ 550, 551.

length of time afterwards.¹ The entry in the entry book is constructive notice until the deed is spread in full upon the record.² It may be kept in the office and referred to until it is transcribed. When it is spread upon the record, however, it is notice of only what appears upon the record. A presumption in favor of the record will prevail against the testimony of a subsequent purchaser or mortgagee that at the time of filing his deed for record no incumbrance upon the property appeared of record.³

The record is not defective for the reason that a portion of it was printed instead of being written with pen and ink.⁴

543. As to the time when a mortgage deed was left for record, the certificate of the register is conclusive as between the mortgagee and a creditor who has attached the mortgaged land subsequently to the time stated in the certificate.⁵ If the mortgage be left at the registry in the absence of the recorder, and it is received and filed by a clerk in charge of the office, the filing is sufficient, though the clerk has no authority to perform the duties of the register. It is the duty of the recording officer to enter and number the mortgage, and the rights of the mortgagee cannot be impaired by his omission to do so.⁶ The certificate is not, however, conclusive of anything beyond the time of the receipt of the instrument for record, as, for instance, it is not conclusive that it is duly recorded.⁷

If a mortgage be left with a register with directions that it should not be placed on record until further directions should be given, and the register's clerk records it without such directions ever having been given, there is no effectual recording of it. In such case if directions should be subsequently received to record the mortgage, the record should be made as of the time when such instructions are received, and not as of the time when the deed was left, nor of the time when it was recorded without authority.⁸

¹ Wood's Appeal, 82 Pa. St. 116; Kiser v. Heuston, 38 Ill. 252; Franklin v. Cannon, 1 Root (Conn.), 500; Throckmorton v. Price, 28 Tex. 605; Brooke's Appeal, 64 Pa. St. 127; Musser v. Hyde, 2 W. & S. (Pa.) 314; Bank of Ky. v. Haggin, 1 A. K. Marsh. (Ky.) 306; Sinclair v. Slawson, 44 Mich. 123.

² Sinclair v. Slawson, *supra*.

³ Vandercook v. Baker, 48 Iowa 199.

⁴ Maxwell v. Hartmann, 50 Wis. 660.

⁵ Tracy v. Jenks, 15 Pick. (Mass.) 465; Adams v. Pratt, 109 Mass. 59; Fuller v. Cunningham, 105 Mass. 442; Ames v. Phelps, 18 Pick. (Mass.) 314.

⁶ Dodge v. Potter, 18 Barb. (N. Y.) 193.

⁷ N. Y. Life Ins. Co. v. White, 17 N. Y. 469; Thorp v. Merrill, 21 Minn. 336; Worcester Nat. Bank v. Cheney, 87 Ill. 602.

⁸ Brigham v. Brown, 44 Mich. 59.

REQUISITES AS TO TIME AND MANNER OF RECORDING. [§§ 544, 545.]

When the time of receiving a mortgage for record as entered in the index book shows upon its face that it was not made at the time of such reception, the presumption of the correctness of the register's entry is lost.¹ The filing of a mortgage for record affords no notice, if the deed be withdrawn before it is recorded.²

As between two mortgagees, whose mortgages are executed and recorded on the same day, parol evidence is admissible to show which was first deposited for record.³ To ascertain which is prior the fractional parts of a day are considered.⁴ In case no entry is made upon the record of the time of the recording of the mortgage, when the law of a state required no such entry, and it appears from the record to have been recorded at an early day, it will be presumed that the record was made within the time required by law after the execution of it.⁵

544. It will be observed that the recording acts of some states, as, for instance, of Georgia, Indiana, Maryland, Pennsylvania, and Wyoming Territory, provide that a mortgage shall be recorded within a specified time after the execution of it. The effect of this provision is not to invalidate the mortgage as between the parties if not recorded within the time specified. It is admissible in evidence, and is an equitable lien, although not so recorded.⁶ The failure to comply with this requirement only goes to the effect of the mortgage as to subsequent purchasers. As to those whose conveyances are registered before it the mortgage is ineffectual.⁷ Of two mortgages of equal equity, recorded within the time limited after execution, that which is first recorded has priority.⁸

545. A mortgage may be recorded after the death of the mortgagor, if he has in his lifetime made delivery of it. His general creditors cannot for that reason claim that the mortgage was inoperative as against them.⁹ The recording of a deed is no

¹ Hay v. Hill, 24 Wis. 235.

² Worcester Nat. Bank v. Cheeney, *supra*.

³ Spaulding v. Scanland, 6 B. Mon. (Ky.) 353; Boone v. Telles, 2 Bradw. (Ill.) 539.

⁴ Lemon v. Staats, 1 Cow. (N. Y.) 592.

⁵ Hall v. Tunnell, 1 Houst. (Del.) 320.

⁶ Sixth Ward Building Ass'n v. Willson, 41 Md. 506; Den v. Watkins, 6 N. J. L. (1 Halst.) 445; Ashe v. Livingston, 2 Bay (S. C.), 80; Penman v. Hart, Ib.

251; Ash v. Ash, 1 Ib. 304; Rootes v. Holliday, 6 Munf. (Va.) 251; Plume v. Bone, 13 N. J. L. (1 Green) 63; Charter v. Graham, 56 Ill. 19.

⁷ Cowan v. Green, 2 Hawks (N. C.), 384.

⁸ Dungan v. Am. Life Ins. & Trust Co. 52 Pa. St. 253; Den v. Roberts, 4 N. J. L. (1 South.) 315.

⁹ Gill v. Pinney, 12 Ohio St. 38; Haskell v. Bissell, 11 Conn. 174.

part of its execution. Neither does a lien attach to the real estate of a debtor in favor of his general creditors immediately upon his death, as against the specific lien of the mortgage which was good against the mortgagor. His heirs take the estate upon his decease subject to the incumbrance; and the lien of the general creditors, which is merely a right to have the real estate in the hands of the heirs applied for their benefit upon a deficiency of the personal assets, attaches to it in the same condition.¹ In like manner a mortgage executed and delivered before a general assignment of the mortgagor, for the benefit of his creditors or before his bankruptcy, if valid in other respects is valid against the assignment or the bankruptcy, though not recorded until afterwards.²

546. When it is provided that mortgages shall be recorded in books kept for that purpose separate from other instruments, a mortgage recorded as a deed is not effectual as against subsequent *bond fide* purchasers or mortgagees; even if the mortgage be in form an absolute deed, but intended as security for a loan of money.³ If a mortgage is not recorded in the mortgage books, it cannot be found by means of the index to those books, and therefore is not regarded as properly recorded.⁴ Such a deed is of course valid as between the parties,⁵ and though the record is a nullity, it becomes operative in case the mortgagee afterwards acquires the equity of redemption.⁶ A subsequent purchaser or mortgagee, who has actual notice of a mortgage which is improperly recorded as an absolute conveyance, of course takes a title subject to such mortgage just as he would if the mortgage were not recorded at all. A statute which is merely directory to the recorder in this respect would not invalidate a record of the mortgage not made in the record books specially used for mortgages.⁷

Of course the mortgage, whether in regular form or by way of

¹ Gill v. Pinney, 12 Ohio St. 38.

² Mellon's Appeal, 32 Pa. St. 121; Wyckoff v. Remsen, 11 Paige (N. Y.), 564.

³ Warner v. Winslow, 1 Sandf. (N. Y.) Ch. 430; Brown v. Dean, 3 Wend. (N. Y.) 208; White v. Moore, 1 Paige (N. Y.), 551; Grimstone v. Carter, 3 Ib. 421; James v. Morey, 2 Cow. (N. Y.) 246; S. C. 6 Johns. (N. Y.) Ch. 417; Clute v. Robison, 2 Johns. (N. Y.) 595; Dey v.

Dunham, 2 Johns. (N. Y.) Ch. 182; Cordeviollé v. Dawson, 26 La. Ann. 534; Calder v. Chapman, 52 Pa. St. 359, 362, and cases cited.

⁴ Luch's Appeal, 44 Pa. St. 519.

⁵ James v. Morey, 6 Johns. (N. Y.) Ch. 417.

⁶ Warner v. Winslow, 1 Sandf. (N. Y.) Ch. 430; Grellet v. Heilshorn, 4 Nev. 526.

⁷ Smith v. Smith, 13 Ohio St. 532.

an absolute deed, is valid between the parties, although the statute requirement that it be recorded as a mortgage be not complied with.¹

547. It is sometimes provided by statute that a power of attorney, under which a mortgage is executed, shall be recorded with the deed, which owes its existence to the power, and when this is the case the record of the deed without the power has no legal effect.² But, aside from this requirement, it is not necessary that a power should be recorded with the mortgage, or that it should be recorded at all, in order that the mortgage deed when recorded should be notice to all the world.³

The record of a power of attorney, when the law does not require it to be recorded, does not amount to constructive notice.⁴ The law does not intend that to be known for the existence of which there is no legal necessity.⁵

548. Record of separate defeasance. — When an absolute deed is given in the way of security, with written defeasance back, the rights of the mortgagee are in general fully protected without any record of the defeasance. The deed is sufficient notice of his interest.⁶ In fact it is notice of a greater interest than he actually has. But this does not matter except in those states in which the recording of the defeasance is expressly required as a condition upon which the mortgagee shall derive any benefit from the record of the deed, as in California, Dakota Territory, Delaware, Maryland, Nebraska, New Jersey, and New York.⁷ When the defeasance is not recorded, the obvious effect of the record of the deed alone is to make the grantee the apparent absolute owner of the estate, and the person who holds the defeasance may be barred of all right of redemption by a sale by the mortgagee to one who buys in good faith and without notice

¹ James v. Morey, 2 Cow. (N. Y.) 246; S. C. 6 Johns. (N. Y.) Ch. 417.

² Carnall v. Duval, 22 Ark. 136.

³ Wilson v. Troup, 2 Cow. (N. Y.) 195.

⁴ Williams v. Birbeck, Hoff. (N. Y.) 359.

⁵ James v. Morey, 2 Cow. (N. Y.) 246, 296.

⁶ § 263; Clemons v. Elder, 9 Iowa, 272; Young v. Thompson, 2 Kans. 83; Newberry v. Bulkley, 5 Day (Conn.), 384; but see Friedley v. Hamilton, 17 S. & R. (Pa.) 70; Jaques v. Weeks, 7 Watts (Pa.), 261, 287.

⁷ See statutes, *ante*. The same rule is judicially established in Pennsylvania. "A mortgage," says Mr. Justice Black, in Hendrickson's Appeal, "when in the shape of an absolute conveyance, with a separate defeasance, the former being recorded the latter not, gives the holder no rights against a subsequent incumbrancer. It is good for nothing as a conveyance, because it is, in fact, not a conveyance; and it is equally worthless as a mortgage, because it does not appear by the record to be a mortgage."

of such defeasance. As to third persons the absolute conveyance is not defeated or affected unless the defeasance is also recorded; and an express declaration to this effect has been made by statute in several states, as in Delaware, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Oregon, Rhode Island, Wisconsin, and Wyoming Territory; and in New Hampshire it is provided that the conveyance shall not be defeated or the estate incumbered, unless the defeasance is contained in the condition of the mortgage. The object of the latter statute is to protect innocent purchasers from the mortgagee, who has apparently an indefeasible title; while the provision whereby the record of the defeasance is enforced, in the states before named, is made for the protection of the mortgagor.

These requirements of statute have no application when the conveyance to which the defeasance relates does not purport upon its face to be absolute and unconditional.¹ While a purchaser in good faith and without notice from a mortgagee, by an absolute conveyance obtains a title not subject to redemption, yet if the purchaser has notice of the original transaction, he takes only the mortgagee's title; and if there are successive mutations, but always coupled with such notice, the original conveyance continues as a mortgage.² The fact that the grantor remains in possession of the property has been held sufficient to charge the purchaser with such notice.³

549. A purchaser may rely upon the legal title as it appears of record. These provisions of statute are only the enactment of a principle that is necessarily deduced from the general provisions of the registry system, and which had already been established by judicial construction.⁴ "It is regarded," says Chief Justice Redfield, "as more in conformity to just principles of equity and fair dealing, that the estate of the *cestui que trust* should be extinguished by the deed of the trustee, than that the equal equity of the purchaser should be defeated, and thus the free and fair transmission of estates be embarrassed and placed under a cloud of suspicion and doubt. The equities of the parties

¹ Russell v. Waite, Walk. (Mich.) 31; (Mass.) 157; Newhall v. Pierce, 5 Ib. 450; Harrison v. Phillips Academy, 12 Noyes v. Sturdivant, 18 Me. 104.

² Brown v. Gaffney, 28 Ill. 149; Shaver v. Woodward, Ib. 277; Hall v. Savill, 3 Greene (Iowa), 37; Williams v. Thorn, 11 Paige (N. Y.), 459.

³ Mann v. Falcon, 25 Tex. 271, 274.

⁴ See § 339; Newhall v. Burt, 7 Pick.

Jacobs, 10 Mich. 349.

being equal, the legal estate is allowed to prevail, and a rule of policy is at the same time subserved, by leaving the transmission of titles unembarrassed as far as practicable, thus inspiring confidence, rather than distrust, in the transmission of titles to real estate."¹

When the mortgage is by a deed absolute in form, and the defeasance is not recorded, the grantee can of course convey a good title to a *bond fide* purchaser.² The position of the parties is quite the same, when the holder of a mortgage duly recorded has taken a conveyance of the equity of redemption, and has then assigned the mortgage to one who does not record the assignment, and has then conveyed the fee to another. Apparently the mortgagee, at the time of his conveyance in fee, had the complete title by merger of the mortgage in the fee, just as the mortgagee by an absolute deed has it; and the prior assignment of the mortgage by an assignment not recorded amounts to the defeasance not being recorded.³

As elsewhere noticed, in some states neither an attaching creditor nor a judgment creditor is regarded as a purchaser, and therefore he acquires by his attachment or judgment no lien upon the land in the hands of the mortgagee holding the title absolutely, as against the equitable *cestui que trust*, or grantor equitably entitled to the equity of redemption.⁴

5. *Errors in the Record.*

550. If the record of a mortgage be defective for any cause, according to one class of decisions depending somewhat upon statutory provisions, it does not amount to constructive notice.⁵ Every requirement of statute in relation to the execution and acknowledgment or proof of the mortgage must be complied with in order to gain priority by the record of it.⁶ Moreover, the deed as it stands must be spread upon the record correctly. Persons interested in a title have a right to resort to the records to find out the contents of a deed, and can be considered as having notice

¹ *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

² *Bailey v. Myrick*, 50 Me. 171; *Pico v. Gallardo*, 52 Cal. 206; *Tufts v. Tapley*, 129 Mass. 380.

³ *Mills v. Comstock*, 5 Johns. (N. Y.) Ch. 214. See *Purdy v. Huntington*, 42 N. Y. 334; *S. C.* 46 Barb. 389, reversed.

⁴ *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252.

⁵ *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469; *Frost v. Beekman*, 1 Johns. (N. Y.) Ch. 288; *S. C.* 18 Johns. (N. Y.) 544; *Johns v. Scott*, 5 Md. 81; *Heister v. Fortner*, 2 Binn. (Pa.) 40; *Bishop v. Schneider*, 46 Mo. 472.

⁶ *Thompson v. Mack*, Harr. (Mich.) 150; *Weed v. Lyon*, Ib. 363.

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of it only as it appears of record. The rule that the deed is notice from the time it is left for record is subject to the qualification that it is correctly transcribed. When the record itself is defective, it is notice of only what appears upon it. If, for instance, a mortgage for three thousand dollars be, by mistake of the recorder, registered as for three hundred dollars, or a mortgage for four hundred dollars be registered as two hundred dollars, it is notice to subsequent *bond fide* purchasers of a lien of only that amount.¹ And so if a mortgage for five thousand dollars be recorded as for five hundred dollars, although indexed as a mortgage for five thousand dollars, it is a lien as against a *bond fide* subsequent mortgage only for the smaller amount; and the knowledge of such subsequent mortgagee that the mortgage was indexed as a mortgage for the larger amount is not sufficient to charge him with knowledge of the true amount.² And if a material part of the description be omitted from the record, this is not constructive notice.³ It is no part of the purchaser's duty to search the original papers to find out whether the recorder has correctly spread their contents upon the record. The obligation of giving notice rests upon the party holding the title. If the recorder occasions a loss on his part by incorrectly transcribing the deed, he may recover damages of the recorder for such loss.⁴

551. Third persons are not required to go beyond the registry to ascertain whether the title is good. If there is any error or omission in the registry of a mortgage, the mortgagee must suffer for it rather than others who afterwards consult the records and find no incumbrance by mortgage upon the estate. He may in some cases have recourse against the recorder for damages occasioned by his errors or omissions in recording; but otherwise the loss so occasioned must fall upon him.⁵

552. But when by statute the deed is made operative as a record from the time it is filed for record, it follows that any error in transcribing the deed, as, for instance, in the date of the deed or of the acknowledgment,⁶ or in the sum secured by it,

¹ *Frost v. Beekman*, 18 Johns. (N. Y.) 544; *Peck v. Mallams*, 10 N. Y. 509; *Terrell v. Andrew County*, 44 Mo. 309. See *Jennings v. Wood*, 20 Ohio, 261, where a mistake was made in the grantor's name.

² *Gilchrist v. Gough* 63 Ind. 576; S. C. 19 Alb. L. J. 276.

³ *Disque v. Wright* 49 Iowa, 538; S. C. 13 West. Jur. 34, 158.

⁴ *Terrell v. Andrew County*, *supra*.

⁵ *Taylor v. Hotchkiss*, 2 La. Ann. 917.

⁶ *Wood's Appeal*, 82 Pa. St. 116; S. C. 16 Am. Law Reg. 255; *Brooke's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 W. & S. (Pa.) 314.

does not prejudice the mortgagee.¹ The mortgagee is then regarded as having discharged his entire duty when he has delivered his mortgage, properly executed and acknowledged, to the recording officer, and as being in the same attitude as if the deed were at that moment correctly spread upon the record book. No subsequent mistake can deprive the deed of its operation as a recorded instrument. The omission of the name of the mortgagee from the record, after it had been properly entered in the entry book, does not defeat the mortgage as to subsequent purchasers.² A mistake of the officer in transcribing the mortgage, by which it is made to appear to be a security for a smaller amount than is actually provided for by it, does not impair the mortgage as a security for the amount for which it was actually given, although subsequent purchasers and creditors relying upon the record have taken the incumbrance to be only the amount there disclosed. The lien of the mortgage begins when it is left for record and entered in a proper entry book, required to be kept for the purpose of showing what deeds or mortgages are left for record. The mortgagee is under no obligation to supervise the work of the recorder, and see that he spreads the deed upon record, or that he puts it upon the index.³

553. The index is no part of the record, and a mistake in it does not invalidate the notice afforded by a record otherwise properly made.⁴ Although the mortgage be omitted from the index, it is just as much an incumbrance upon the land, and notice of it, from the time it was left for record or transcribed, affects all subsequent purchasers.⁵ The general policy of the recording acts is to make the filing of a deed, duly executed and acknowledged with the proper recording officer, constructive notice from that

¹ *Mims v. Mims*, 35 Ala. 23; *Dubose v. Young*, 10 Ala. 365. See Code of Ala. 1539. "The conveyance is operative as a record from the day of the delivery."

A similar view was taken under a statute of Illinois, providing that deeds "shall take effect and be in force from and after the time of filing the same for record." *Merrick v. Wallace*, 19 Ill. 486, 497; *Polk v. Cosgrove*, 4 Biss. 437; *Riggs v. Boylan*, Ib. 445.

So also in Ohio, where the statute provides that a deed "shall take effect and have preference from the time the same

is delivered to the recorder." *Tousley v. Tousley*, 5 Ohio St. 78.

So in Michigan: *Sinclair v. Slawson*, 44 Mich. 123.

² *Sinclair v. Slawson*, 44 Mich. 123.

³ *Wood's Appeal*, 82 Pa. St. 116; *Payne v. Pavey*, 29 La. Ann. 116.

⁴ *Green v. Garrington*, 16 Ohio St. 548; *Chatham v. Bradford*, 50 Ga. 327; *Lincoln Building & Saving Asso. v. Hass*, 10 Neb. 581; *Gilchrist v. Gough*, 63 Ind. 576.

⁵ *Curtis v. Lyman*, 24 Vt. 338; *Board of Commissioners v. Babcock*, 5 Oregon, 472; *Throckmorton v. Price*, 28 Tex. 605.

time; and although it be provided that the register shall make an index for the purpose of affording a correct and easy reference to the books of record in his office, the index is designed, not for the protection of the party recording his conveyance, but for the convenience of those searching the records; and instead of being a part of the record, it only shows the way to the record. It is in no way necessary that a conveyance shall be indexed, as well as recorded, in order to make it a valid notice.¹

When a grantee has delivered his deed to the recorder, notice of its contents is imparted from that time, if it is correctly spread upon the record. He has done all the law requires of him for his protection. The purpose of the index is only to point to the record, but constitutes no part of it.²

In Pennsylvania, however, under statutes not materially different from those in New York, the reasoning of Mr. Chief Justice Woodward in a late case was, that the mortgage not duly indexed was not constructive notice to third persons; that, as a guide to inquirers, the index is an indispensable part of the re-

¹ *Mutual Life Ins. Co. v. Dake*, 1 Abb. (N. Y.) N. C. 381. Mr. Justice Smith, delivering the opinion of the court, said: "It is not a little surprising to find that a question so likely to come up frequently has not arisen in any reported case in this state. I suppose the usual practice in searching the records in the clerk's office is to consult the index, and to rely upon it. That is obviously the most convenient way; and if the index is full and accurate, it saves the necessity of going through the records themselves. But if the index is imperfect and misleads the searcher, as appears to have been the case here, who is to suffer,—the party who duly transcribed his mortgage in the record book, or the party who, relying on the index, omitted to look at the record? The question is to be answered by determining whether the index is an essential part of the record,—that is to say, whether it is necessary to the completeness and efficiency of the record as a notice to after purchasers." After examining the statutes and reaching the conclusion that the index is no part of the record, he continues: "In reaching this conclusion, I have not overlooked the practical inconveniences that may result from it in searching records.

But the duty of the court is only to declare the law as the legislature has laid it down. Arguments *ab inconvenienti* may sometimes throw light upon the construction of ambiguous or doubtful words; but where, as here, the language of the law makes it plain, they are out of place. Inconveniences in practice will result whichever way the question shall be decided. The power to remedy them is in the legislature, and not in the courts. Even as the law now stands, the party injured by the omission of the clerk is not without remedy, for he has his action against the clerk." See this case commented upon and approved, 4 Cent. L. J. 340.

The same rule was applied under analogous statutes in New York relating to the filing of chattel mortgages. *Dodge v. Potter*, 18 Barb. (N. Y.) 193; *Dikeman v. Puckhafer*, 1 Abb. (N. Y.) Pr. N. S. 32. These cases hold that the mortgagee, by filing and depositing his mortgage with the clerk, did all that he could do, and all that he was required to do, in order to perfect his claim, and that the omission of the mortgage from the index, being without his fault or knowledge, did not prejudice him.

² *Bishop v. Schneider*, 46 Mo. 472.

ording; and that, without it the record affects no party with notice.¹ In this case the purchaser had actual notice of the existence of the mortgage, and therefore could not complain of the want of record; and in that view what was said by the court as to the sufficiency of the record was not material to the result.

554. Damages for errors in the index. — Under this rule one who in good faith has taken a subsequent deed or mortgage of the property, on the faith of finding no incumbrance upon the index, might probably have a remedy for damages against the register, whose duty it was under the law to make the index.² In Missouri a statute provides that a recorder who neglects or refuses to keep an index to the books of record shall pay to the party aggrieved double the damages which may be occasioned thereby; but the court has suggested that before a purchaser can recover for the failure of the recorder to index a prior mortgage upon the property, he must show that the damage arose from the recorder's neglect, and not from other causes; as, for instance, his own reliance upon false outside representations as to the title without an examination of the index, or from his mistaken reliance upon the covenants of the grantor.³

555. Error in descriptive index. — A recital in a mortgage for purchase money, that the premises are the same conveyed to the mortgagor by the mortgagee by deed of even date is generally sufficient notice of the mortgage when recorded, although by mistake the lot described is an entirely different lot. Yet in Iowa, where the laws require a descriptive index to be kept, this recital is held to be an insufficient notice of the conveyance of the lot referred to in the recital, inasmuch as the lot described would appear in the index, and not the lot referred to in the recital.⁴ In that state the descriptive index is an important part of the notice afforded by the record, though it is not necessary that the descriptive part of the index should contain more than a reference to the record; and where a description by plan or survey is impracticable, a reference "to certain lots of land,"⁵ or "see record,"⁶ has been held sufficient. But where the mortgage covered two lots of land, but the description of one of them only was entered in the descriptive column of the index, it was held that the

¹ *Speer v. Evans*, 47 Pa. St. 141. See *Schell v. Stein*, 76 Pa. St. 398.

² *Mut. Life Ins. Co. v. Dake*, 1 Abb. (N. Y.) N. C. 381, per Smith, J.

³ *Bishop v. Schneider*, 46 Mo. 472.

⁴ *Scoles v. Wilsey*, 11 Iowa, 261; *Whalley v. Small*, 25 Iowa, 184; *Calvin v. Bowman*, 10 Iowa, 529.

⁵ *Bostwick v. Powers*, 12 Iowa, 456.

⁶ *White v. Hampton*, 13 Iowa, 259.

record did not impart constructive notice of the lot not described, and that the consequences of the recorder's error should fall upon the mortgagee rather than upon subsequent purchasers.¹ The record, though complete in every other respect, except that it is not properly indexed, does not operate as constructive notice.²

Yet, while an index is insufficient if it would mislead an inquirer by giving a totally wrong description, a mistake in the index reference to the page of the book where the instrument is recorded, the names of the grantor and the grantee being correctly given, does not prevent its operating as constructive notice of the acts which would be disclosed by an examination of the record. The record book and the index book are not considered detached and independent books, but are related and connected, and a party is affected with notice of the contents of the record, when an ordinarily diligent search will bring him to a knowledge of such contents. To a competent examiner of the records, finding the name of one entered upon the index as having made a mortgage, it would occur that it was much more likely that the recorder should make an error in entering the page of the record, than that he should mistake the name of the mortgagor, or should enter his name at all if he had not recorded the deed.³

556. A mortgage defectively recorded an equitable lien. —

But although a mortgage be defectively recorded, or not recorded at all, so that it has no effect as against subsequent purchasers in good faith, yet it is a good equitable lien, and is superior to the claims of creditors under subsequent judgments; and is superior to the claims of general creditors who were such at the date of the mortgage;⁴ and is superior to a subsequent voluntary assignment by the mortgagor for the benefit of creditors.⁵ In like manner a mortgage defectively executed, as, for instance, attested by only one witness when two are required, is a good equitable mortgage.⁶ According to the authorities in some states, however, a mortgage defectively recorded, or not recorded at all, gives no

¹ *Noyes v. Horr*, 13 Iowa, 570.

² *Gwynn v. Turner*, 18 Iowa, 1; *Howe v. Thayer*, 49 Iowa, 154.

³ *Barney v. Little*, 15 Iowa, 527. See comments upon this and other Iowa cases, 4 Cent. L. J. 387.

⁴ *Lake v. Doud*, 10 Ohio, 415; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21; otherwise, however, under later cases in

Ohio: *White v. Denman*, 1 Ohio St. 110; *Bloom v. Noggle*, 4 Ohio St. 45; *Sixth Ward Build. Ass'n No. 5 v. Willson*, 41 Md. 506; and see *Price v. McDonald*, 1 Md. 403; *Phillips v. Pearson*, 27 Md. 242; *Bibb v. Baker*, 17 B. Mon. (Ky.) 292.

⁵ *Nice's Appeal*, 54 Pa. St. 200.

⁶ *Abbott v. Godfrey*, 1 Mich. 178

priority to the mortgagee over any other creditor.¹ As against third parties having notice of such mortgage, it is also a good specific lien which will be enforced against them in equity.²

Such equitable mortgages have been held to be superior to the claims of the mortgagor's general creditors. This was the rule in South Carolina before the Act of 1843, now embodied in the Revised Statutes of that state. A legal mortgage not recorded, or an equitable mortgage, incapable of record, was preferred to a subsequent creditor without notice. The consequence of imparting validity to unrecorded mortgages is said to have wrought much injury by impairing confidence in titles, and thereby depreciating the value of real estate. The act above referred to placed subsequent creditors and purchasers upon the same footing.³

6. *The Effect of a Record duly made.*

557. The record of a mortgage is constructive notice of its contents to all subsequent purchasers and mortgagees.⁴ As to them the mortgage takes effect not because of its prior execution, but by reason of its prior record. The mortgage is in the line of their title, and by the record they become bound by it as much as the mortgagor himself.⁵ It is notice only to subsequent purchasers and incumbrancers, and not to those who have prior rights, or even to those whose rights are contemporaneous with those of the mortgagor, as, for instance, to his co-tenants; therefore a mortgage by one tenant in common, though duly recorded, is no notice to his co-tenant of its existence, or of the claim of the mortgagor to the exclusive ownership of the land.⁶

When a mortgage is recorded prior to another conveyance from the mortgagor, it does not matter that this conveyance was

¹ *Henderson v. McGhee*, 6 Heisk. (Tenn.) 55.

² *Racouillat v. Sansevain*, 32 Cal. 376; *Russum v. Wanser*, 53 Md. 92; *Dyson v. Simmons*, 48 Md. 207.

³ *Boyce v. Shiver*, 3 S. C. 515. "There is not a single modern writer, whose opinion carries weight, who does not regret that the courts ever favored the introduction of secret liens."

⁴ *Humphreys v. Newman*, 51 Me. 40; *Hall v. McDuff*, 24 Me. 311; *Bolles v. Chauncey*, 8 Conn. 389; *Peters v. Goodrich*, 3 Conn. 146; *Dennis v. Burritt*,

6 Cal. 670; *McCabe v. Grey*, 20 Cal. 509; *Clabaugh v. Byerly*, 7 Gill (Md.), 354; *Souder v. Morrow*, 33 Pa. St. 83; *Johnson v. Stagg*, 2 Johns. (N. Y.) 510; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Buchanan v. International Bank*, 78 Ill. 500; *Barbour v. Nichols*, 3 R. I. 187; *Doyle v. Stevens*, 4 Mich. 87; *Ogden v. Walters*, 12 Kans. 282.

⁵ *Tripe v. Marcy*, 39 N. H. 439; *Grandin v. Anderson*, 15 Ohio St. 286; and see *Leiby v. Wolf*, 10 Ohio, 83.

⁶ *Leach v. Beattie*, 33 Vt. 195.

made in pursuance of a contract entered into after the execution of the mortgage, and before the record of it, if nothing had been done towards carrying the contract into execution at the time of the filing of the mortgage for record.¹ From that time it is constructive notice to all who may afterwards acquire any interest in the same property.

A mortgage duly recorded is notice not only of the existence of the mortgage, but of all its contents.² It is notice too of the covenants contained in it.³ It is notice that trustees in a trust deed should have an estate in fee simple in order to execute its provisions; and therefore that an estate in fee passes although words of inheritance have been inadvertently omitted.⁴ Although the debt be not fully described, the record is notice of all that is said about it, and a purchaser is bound by the statements made, and by the information he is put upon the inquiry to find out.⁵ It is notice of the statements in it regarding the debt, whether the description be fully set out, or consists of references to other instruments.⁶ It is notice not only to purchasers, but to subsequent creditors as well. They cannot complain that the transaction is fraudulent, unless they can show that the object of the conveyance was to avoid subsequent indebtedness.⁷

The record of a mortgage containing a power of sale puts subsequent purchasers upon inquiry whether any proceedings have been had thereunder; so that if there has been a sale under the power, although the deed has not been recorded, a subsequent purchaser from the mortgagor, instead of acquiring an equity of redemption, may find that this has been cut off by sale under the power.⁸ The deed executing the power of sale relates back to the execution of the mortgage; and when the mortgage is recorded, it is not necessary to record the deed under the power in order to protect the grantee against attaching creditors of the mortgagor.⁹

558. Priority once gained cannot be lost. The registry of a mortgage is equivalent to a notice of it to all persons who may subsequently become interested in the property, and fully protects

¹ *Kyle v. Thompson*, 11 Ohio St. 616.

² *Thomson v. Wilcox*, 7 Lans. (N. Y.) 376.

³ *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103.

⁴ *Randolph v. N. J. West Line R. R. Co.* 28 N. J. Eq. 49.

⁵ *Youngs v. Wilson*, 27 N. Y. 351, reversing 24 Barb. (N. Y.) 510.

⁶ *Dimon v. Dunn*, 15 N. Y. 498.

⁷ *Hickman v. Perrin*, 6 Coldw. (Tenn.) 135.

⁸ *Heaton v. Prather*, 84 Ill. 330.

⁹ *Farrar v. Payne*, 73 Ill. 82.

the mortgagee's rights. A mortgage once having obtained priority by record does not lose its place by being held by any one under an unrecorded assignment.¹ And although the mortgagee had notice of a prior unrecorded mortgage, or there are equities such that his own mortgage is in his hands subject to them, yet if he assigns his mortgage for a valuable consideration to one who has no notice of the earlier mortgage or of such equities, the assignee is entitled to hold the mortgage as a prior lien upon the land, solely upon the ground that it was first recorded.²

Having recorded his mortgage, the mortgagee is not bound to give personal notice of his mortgage to one who purchases of the mortgagor; and a delay for ten years, or for any other period less than the statute period of limitation, to make any claim of the purchaser under the mortgage, does not impair his rights under the mortgage either at law or in equity; and the fact that the mortgagor has in the mean time become insolvent does not prejudice his claim upon the property.³

A mortgage being duly recorded, the subsequent dealings of the mortgagor and others claiming under him have no effect whatever upon it. If, for instance, the mortgagor subsequently sells the land and reserves a right of way, this right remains subject to the title of the mortgagee, and a sale under a mortgage destroys this, as well as the title to the remainder of the land.⁴

In accordance with these principles, it follows that a junior mortgage duly recorded, without notice of a prior unrecorded mortgage, has precedence of it;⁵ in other words, the mortgages take precedence in the order of the record. This precedence follows them through any subsequent transfers, or through any proceedings to enforce the liens. When the mortgage first recorded is foreclosed, a purchaser at the foreclosure sale obtains a complete and absolute title. But a purchaser at a foreclosure sale,

¹ *Brinckerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65; *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394; *Campbell v. Vedder*, 3 Keyes (N. Y.), 174; *S. C. 1 Abb. Dec. 295*; and see *Douglass v. Peele*, *Clarke* (N. Y.), 563; *Johnson v. Stagg*, 2 Johns. (N. Y.) 510.

² *Corning v. Murray*, 3 Barb. (N. Y.) 652.
³ *Dick v. Balch*, 8 Pet. 30; *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Mason v. Philbrook*, 69 Me. 57.
⁴ *King v. McCully*, 38 Pa. St. 76.
⁵ *Taylor v. Thomas*, 5 N. J. Eq. (1 Halst.) 381; *Grant v. Bissett*, 1 Caines (N. Y.) Cas. 112; *Pomet v. Scranton*, 1 Miss. (Walk.) 406; *Harrington v. Allen*, 48 Miss. 492; *Routh v. Spencer*, 38 Ind. 393; *Psychaud v. Citizens' Bank*, 21 La. Ann. 262; *Harang v. Plattsmier*, Ib. 426; *Burns v. Berry*, 42 Mich. 176.

under the mortgage recorded next in order of time, obtains only an equity of redemption of the prior mortgage.¹

559. The destruction of the record of a deed in no manner affects the constructive notice afforded by its having been recorded.² If the mortgage itself has been preserved, the recorder's certificate of its having been duly recorded is of the highest class of evidence.³ So, also, the index book in which the deed is described, and its record certified in the proper book, are good evidence of the fact that the deed was recorded.⁴ Other evidence may show that the deed was filed for record; and when this is the case, the testimony of an attorney of a purchaser, that he examined an abstract of the title to the property, which purported to be a full and complete abstract, and did not find a prior deed of trust upon the premises, is not sufficient to show that there was no record of it, as it does not follow that the abstract was what it purported to be.⁵

Where the registry office and its records have been destroyed by fire, evidence of the execution of a mortgage and of its loss, with slight circumstances in regard to the recording of it, have been held enough to sustain a presumption that it was recorded, as against a prior mortgagee who claims priority on the ground that such mortgage was never recorded.⁶

A mortgagee, in order to protect his rights under his mortgage, need not, unless he choose, incur the trouble and expense of restoring the record under an act providing for the restoration of burnt records. He may foreclose his mortgage, although in the mean time the mortgagor has sold and conveyed the mortgaged premises to one who had no knowledge of the existence of the mortgage, and who took possession and retained it several years with the knowledge of the mortgagee, who did not file his bill to foreclose his mortgage for six years afterwards.⁷ A restoration of the record may be had, if desired, upon proof of proceedings for foreclosure of a mortgage, in a court of general jurisdiction, a decree of sale, a sale under it, and its approval by the court, and

¹ *Tice v. Annin*, 2 Johns. (N. Y.) Ch. Ill. 600; *Armentrout v. Gibbons*, 30 Ill. 125; *Mathews v. Aikin*, 1 N. Y. 595; *Gratt. (Va.)* 632.

Vanderkemp v. Shelton, 11 Paige (N. Y.), 28; *Gilbert v. Averill*, 15 Barb. (N. Y.) 20; *Buchanan v. International Bank*, 78 Ill. 500.

² *Alvis v. Morrison*, 63 Ill. 181.

³ *Alvis v. Morrison*, *supra*.

⁴ *Steele v. Boone*, 75 Ill. 457.

⁵ *Alston v. Alston*, 4 S. C. 116.

⁶ *Steele v. Boone*, 75 Ill. 457; *Gammon v. Hodges*, 73 Ill. 140; *Heaton v. Shannon*, 85 Ill. 473.

⁷ *Shannon v. Hall*, 72 Ill. 354; *Hall v. Prather*, 84 Ill. 330; *Curry v. Berry*, 84

the delivery of a certificate of purchase; and the court will thereupon order the execution of a deed to the purchaser, and a surrender of possession to him.¹

560. Any one purchasing land in good faith, without notice of an unrecorded mortgage, takes it discharged of the lien;² and he can convey a good title to it, although the mortgage is recorded before he conveys and his vendee has notice of it.³ Having no actual notice of the mortgage, the purchaser is not bound to look beyond the line of title in his grantor; and finding that he acquired a good title he is not bound to look further; he acquires all the right and title that his grantor acquired. His grantor being entitled to protection against a prior unrecorded mortgage, he is entitled to the same protection, notwithstanding the notice he himself had of such mortgage, and although he is not a purchaser for a valuable consideration.⁴

Not only is a purchaser without notice of a prior unrecorded mortgage, or of other equitable claim to the property, entitled to protection, even though he takes the title from one who had actual notice of such claim, but also a purchaser with notice from one who was entitled to protection as a *bonâ fide* purchaser without notice is himself entitled to protection against the previous equitable claim upon the estate; for otherwise a *bonâ fide* purchaser might be deprived of the power of selling his property for its full value. This protection extends to all persons claiming through the mortgage, whether they had notice at the time of the purchase or not.⁵

561. If one having no title to land conveys it in mortgage with covenants of warranty, and this is duly recorded, and afterwards the mortgagor acquires title to the land, the estoppel by which he is bound under the covenants is turned into a good estate in interest in the mortgagee, so that by operation of law

¹ *Curyea v. Berry*, 84 Ill. 600. See, as to effect of decree reestablishing a record under a statute, *Hunt v. Innis*, 2 Woods, 103.

² *Huebsch v. Scheel*, 81 Ill. 281; *Holbrook v. Dickenson*, 56 Ill. 497; *Hodgen v. Guttery*, 58 Ill. 431; *Ohio Life Ins. & Trust Co. v. Ledyard*, 8 Ala. 366; *Burke v. Allen*, 3 Yeates, (Pa.), 351; *Burns v. Berry*, 42 Mich. 176.

³ *Jackson v. McChesney*, 7 Cow. (N. Y.) 360; *Jackson v. Van Valkenburgh*, 8

Cow. (N. Y.) 260; *Bush v. Lathrop*, 22 N. Y. 535, 549; *Jackson v. Given*, 8 Johns. (N. Y.) 137; *Cook v. Travis*, 20 N. Y. 400; *Losey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246.

⁴ *Wood v. Chapin*, 13 N. Y. 509; *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 211; *Crane v. Turner*, 7 Hun. (N. Y.), 357.

⁵ *Varick v. Briggs*, 6 Paige (N. Y.), 323; *Cook v. Travis*, 22 Barb. (N. Y.) 338; S. C. 20 N. Y. 400.

the title is considered as vested in him in the same manner as if it had been conveyed to the mortgagor before he executed the mortgage. The mortgagor is estopped to say he was not then seised. Then, if the mortgagor executes another mortgage, and this and the deed by which the mortgagor acquired his title are both recorded together, which mortgagee has the better title? The estoppel binds not only the mortgagor and his heirs but his assigns as well. A second mortgagee is therefore estopped to aver that the grantor was not seised at the time of his making the first mortgage, and that mortgage being first recorded must have priority.¹

But if a mortgagor has title at the time of executing two mortgages, the fact that one contains covenants of warranty does not give it priority over the other which contains no such covenants, if the latter be first filed for record.²

562. After the mortgage is made and recorded, the record of any deeds subsequently made by the mortgagor is not notice to the mortgagee;³ and if he has no actual knowledge of any such subsequent deed, he may, without receiving anything upon the mortgage debt, release any portion of the mortgaged property to the mortgagor without impairing his security upon the remainder for the whole mortgage debt; although if he had notice of a sale of any part of the remaining land, he might be obliged to abate a proportionate part of the mortgage debt in order to protect the purchaser. The equity which entitles a subsequent mortgage incumbrancer to the benefit of such a release

¹ §§ 679, 682, 825, 1483, 1656, 1671; *White v. Patten*, 24 Pick. (Mass.) 324; *Tefft v. Munson*, 57 N. Y. 97; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.), 361; *Doyle v. Peerless Petroleum Co.* 44 Barb. (N. Y.) 239; *Wark v. Willard*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 N. H. 533; *Somes v. Skinner*, 3 Pick. (Mass.) 52; *Pike v. Galvin*, 29 Me. 183; *Philly v. Sanders*, 11 Ohio St. 490; *Jarvis v. Aikens*, 25 Vt. 635. See, however, *White & Tudor's Lead. Cases in Eq.* 4th Am. ed. vol. 2, pt. 1, p. 212.

² *Vandercook v. Baker*, 48 Iowa 199.

³ *Birnie v. Main*, 29 Ark. 591; *George v. Wood*, 9 Allen (Mass.), 80; *James v. Brown*, 11 Mich. 25; *Doolittle v. Cook*, 75 Ill. 354; *Iglehart v. Crane*, 42 Ill. 261; *Halstead v. Bank of Ky.* 4 J. J. Marsh.

(Ky.) 555, 558; *King v. McVickar*, 3 Sandf. (N. Y.) Ch. 192; *Westbrook v. Gleason*, 14 Hun (N. Y.), 245; *Truscott v. King*, 6 Barb. (N. Y.) 346; *Stuyvesant v. Hall*, 2 Barb. (N. Y.) Ch. 151; *Raynor v. Wilson*, 6 Hill (N. Y.), 469; *Taylor v. Maris*, 5 Rawle (Pa.), 51; *Hill v. McCarter*, 27 N. J. Eq. 41; *Blair v. Ward*, 10 N. J. Eq. (2 Stockt.) 119, 126; *Van Orden v. Johnson*, 14 N. J. Eq. 376; *Hoy v. Bramhall*, 19 N. J. Eq. 563; *Cooper v. Bigly*, 13 Mich. 463; *Leiby v. Wolf*, 10 Ohio, 83; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Wheelwright v. De Feyster*, 4 Edw. (N. Y.) 232; *Talmage v. Wilgers*, Ib. 239, n.; *Stuyvesant v. Hone*, 1 Sandf. (N. Y.) Ch. 419; *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Heaton v. Prather*, 84 Ill. 330; § 723.

arises only when the first mortgagee gives it with knowledge at the time of the existence of the subsequent incumbrance. If the subsequent incumbrance be a mechanic's lien, the mere fact that the building was commenced after the mortgage was given, and that the mortgagee knew this, is not sufficient to charge him with knowledge of the lien.¹

Whatever may be the equities of the subsequent mortgagee, a prior mortgagee is not bound by them unless he has actual notice, or such notice as should put him upon inquiry.² There can be no retrospective effect to the record. A mortgagee, having recorded his deed, secures the protection of the registry laws, and he is not required to search the record from time to time to see whether other conveyances have been put upon the record. While the law requires every man to deal with his own so as not to injure another, it imposes a greater obligation on the second mortgagee to take care of his own interests, than upon the first mortgagee to take care of them for him. To make it the duty of the first mortgagee to inquire before he acts lest he may injure some one, would be to reverse this rule, and make it his duty to do for the second mortgagee what the latter should do for himself.³

In like manner, the recording of a mortgage affords no notice whatever to a prior purchaser of the land, who is in possession under a bond for a deed, so that the mortgagee had constructive notice of his rights, and without actual notice he may lawfully complete his payments to his vendor, without becoming liable to such mortgagee.⁴

563. The extent of the lien. — The record of the mortgage is notice of an incumbrance for the amount specified in it, or so referred to as to put subsequent purchasers upon inquiry as to the extent of the lien.⁵ It is not notice of any claim which is not so specified or referred to.⁶ Subsequent purchasers are bound by nothing more than is disclosed by record, unless express notice is proved. As against them, if the mortgage debt is not payable with interest, they cannot be prejudiced by any change of interest; although in case there be other security for the debt, they cannot object to the application of that to the payment of

¹ *Ward v. Hague*, 25 N. J. Eq. 397.

⁴ *Doolittle v. Cook*, 75 Ill. 354.

² *Duester v. McCamus*, 14 Wis. 307;
Straight v. Harris, Ib. 509.

⁵ *Youngs v. Wilson*, 27 N. Y. 351;
Dean v. De Lezardi, 24 Miss. 424.

³ *James v. Brown*, 11 Mich. 25; *Birnie*
v. Main, 29 Ark. 591. See § 372.

⁶ *Hinchman v. Town*, 10 Mich. 508.

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interest in the first place.¹ But actual notice of the amount secured by a mortgage is binding upon a subsequent purchaser, although there be a mistake in the record.²

564. Extension of mortgage. — An agreement for further time, and a higher rate of interest, is not binding upon the property, or upon subsequent purchasers, unless duly executed and recorded. It is merely a personal obligation between the parties, and the increased indebtedness cannot operate as a lien upon the land.³ An agreement for extension duly recorded, but which does not identify the mortgage by any sufficient reference, has no greater effect by reason of the record.⁴

565. Rate of interest. — The mortgage is a lien only for the rate of interest specified in it, or for the rate established by law, when it is simply made payable with interest.⁵ If the parties to the mortgage subsequently agree upon an advanced rate, this agreement is not binding upon subsequent purchasers, unless it is executed with the formalities which entitle it to be recorded, and is in fact duly recorded before others acquire any interest in the property.

In like manner, where a mortgage was given without interest, but with a verbal agreement that the mortgagee should receive certain rents in lieu of interest, he cannot as against a subsequent mortgagee, who had no notice of this agreement, enlarge his demand beyond what appeared of record, and claim a lien upon the property for the payment of interest as well as principal.⁶

After the making of a mortgage, the parties to it cannot make an agreement for the payment of a higher rate of interest than that stipulated for in the mortgage, that will be a lien upon the premises as against a purchaser of the property before such agreement was made, or after it was made but without notice of it.⁷

But in case of a mortgage for the purchase money the wife having no right of dower except in the surplus above the mortgage, an agreement to pay a higher rate of interest in consideration of an extension of time may be enforced against the property, so far as the wife's dower is concerned.⁸

¹ *Lash v. Edgerton*, 13 Minn. 210.

² *Frost v. Beekman*, 1 Johns. (N. Y.) Ch. 288.

³ See § 361; *Davis v. Jewett*, 3 Greene (Iowa), 226; *Gardner v. Emerson*, 40 Ill. 296.

⁴ *Bassett v. Hathaway*, 9 Mich. 28.

⁵ See § 361; *Whittacre v. Fuller*, 5 Minn. 508.

⁶ *St. Andrew's Church v. Tompkins*, 7 Johns. (N. Y.) Ch. 14.

⁷ *Bassett v. McDonel*, 13 Wis. 444.

⁸ *Thompson v. Lyman*, 28 Wis. 266.

566. The recording acts have no application to mortgages executed and recorded simultaneously.¹ Neither have they any application to mortgages executed at the same time and held by the same person, for he has, of necessity, notice of both mortgages.² The record of one before the other is in such case without effect. Such mortgages are concurrent liens, whether in the hands of the mortgagee or in the hands of assignees. Nor have they any application when the mortgages expressly declare that neither is to have precedence of the other, but are to be alike security for the several debts.³ Nor have they any application as between two mortgages given for purchase money at the same time; and when this fact appears upon the face of the deeds, the prior record of one gives it no priority over the other.⁴ The rights of the parties in such cases may sometimes be controlled by other considerations; and if there be any priority of one over the other, that priority is determined by considerations of equity. Equitable rights and agreements as to priority are recognized and enforced only in courts of equity.⁵

When two mortgages executed at different dates are recorded on the same day, and there is nothing to show which was in fact first recorded, the presumption of law is that the recording of them was concurrent, and each party stands charged with notice of the equities of the other on that day, at the same moment. In such case the mortgage which is prior in execution is regarded as having the superior equity.⁶

The chief effect of recording an assignment of a mortgage is to protect the assignee from a subsequent sale of the mortgage;⁷ the assignment when not recorded is void as against a subsequent purchaser of the mortgage. Therefore, when two simultaneous mortgages of the same land are made under an agreement that they shall be equal liens, the prior record of one gives it no preference over the other. Such a mortgage is not within the terms of a statute declaring an unrecorded conveyance void against a *subsequent* conveyance *first* recorded. A simultaneous conveyance

¹ *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316, aff'g *S. C. Hopk.* (N. Y.) 569; *Douglass v. Peele, Clarke* (N. Y.), 563.

² *Gausen v. Tomlinson*, 23 N. J. Eq. 405; *Vredenburgh v. Burnet*, 31 N. J. Eq. 229.

³ *Howard v. Chase*, 104 Mass. 249.

⁴ *Greene v. Deal*, N. Y. W. Dig., reversing *S. C. 4 Hun* (N. Y.), 703.

⁵ *Jones v. Phelps*, 2 Barb. (N. Y.) Ch. 440.

⁶ *Houfes v. Schultze*, 2 Bradw. (Ill.) 196; *S. C. 11 Chicago L. N. 75*.

⁷ § 474.

is not a subsequent conveyance. An assignment is a conveyance of a mortgage, and if it be not recorded it is void against a subsequent purchaser of the mortgage.¹

If an assignee of one of two simultaneous mortgages be regarded as a subsequent purchaser of some interest in the real estate, then he is affected by the record of the other mortgage, as well as that of which he has taken an assignment; and if either or both contain a recital showing that they are simultaneous, or that both were given for the purchase money of the same land, then the prior record of one can give it no preference over the other.²

If one of two simultaneous mortgages made to the same person be assigned with the representation that it is a first lien upon the premises, this representation will make it so as against the assignor. But as against a subsequent assignee of the other, without notice, such representation is a secret equity by which he is not bound.³

567. Simultaneous mortgages for purchase money.—Where two or more mortgages are made simultaneously to different persons, and are so connected with each other that they may be regarded as one transaction, each mortgagee having notice of the other mortgage, they will be held to take effect in such order of priority or succession as shall best carry into effect the intention and best secure the rights of all the parties.⁴ When the equities of the two mortgages are equal in point of merit, the oldest in point of time will prevail.⁵ If there be no intention to give any preference to either, no preference as between the mortgagees can be obtained by priority of record.⁶ The recording acts in such case have no application. But if one of such mortgages be assigned to a purchaser in good faith without notice of any superior equity in the holder of the other mortgage, such assignee is entitled to the priority gained by an earlier record of his mortgage, even if the other mortgage was superior in equity.⁷

¹ *Greene v. Warnick*, 64 N. Y. 220.

² *Greene v. Warnick*, *supra*; *Van Aken v. Gleason*, 34 Mich. 477.

³ *Vredenburg v. Burnet*, 31 N. J. Eq. 229. In *Lane v. Nickerson*, 17 Hun (N. Y.), 148, it was held such representation would give priority even as against the purchaser of the other mortgage.

⁴ *Pomeroy v. Latting*, 15 Gray (Mass.) 435; *Jones v. Phelps*, 2 Barb. (N. Y.) Ch.

440; *Douglass v. Peele, Clarke* (N. Y.), 563.

⁵ *Houfes v. Schultze*, 2 Bradw. (Ill.) 196.

⁶ *Rhoades v. Canfield*, 8 Paige (N. Y.), 545; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Van Aken v. Gleason*, 34 Mich. 477.

⁷ *Corning v. Murray*, 3 Barb. (N. Y.) 652; *Decker v. Boice*, 19 Hun (N. Y.), 152.

Upon a foreclosure sale under such mortgage the purchaser would be entitled to the same priority which the assignee would have.¹

If two mortgages be made to the same person to secure purchase money, though in the mortgagee's hands one has no priority over the other, he may assign one in such a way as to give it priority over the other subsequently assigned by him.

A foreclosure under a power of sale of one of two mortgages designed to be simultaneous is not effectual to settle the relative rights of the purchaser and the holder of the other mortgage, a bill in equity being necessary to determine them and to marshal the assets. To effect this a sale is necessary, unless one of the parties take up the other's mortgage.²

568. Simultaneous mortgages of which one is for purchase money.— If a purchaser of land, at the instant of receiving his deed, executes and delivers two mortgages of it, one to his grantor, to secure a payment of a part of the purchase money, and the other to a third person, and all the deeds are entered for record at the same moment, the mortgage to his grantor takes precedence. The deed and the mortgage for the purchase money are parts of one transaction, and give the purchaser only an instantaneous seisin. Moreover, the deed and mortgages being all delivered at the same time, the several grantees must be considered as knowing all that took place concerning them, and the third person, therefore, as knowing of the mortgage for the purchase money, to which his own became subject as effectually by his knowledge of its existence, as it would have been if it had been posterior in time of entry for record.³

A vendor of real estate who records his mortgage at the same instant that the deed from him is recorded has no occasion to examine the records for incumbrances created by his vendee upon the property, prior to the recording of his deed. If there be delay in recording such deed and mortgage, and the vendee execute another mortgage of the same property to a stranger, and this is recorded before the deed to the vendee and his mortgage for the purchase money are recorded, the recording of the mortgage to such third person is not notice to the vendor, because at that time the deed to the vendee had not been recorded.⁴

¹ Decker v. Boice, *supra*.

² Van Aken v. Gleason, 34 Mich. 477.

³ Clark v. Brown, 3 Allen (Mass.),

Heffron v. Flanigan, 37 Mich. 274; City

Nat. Bank App. 91 Pa. St. 163.

⁴ Boyd v. Mundorf, 30 N. J. Eq. 545;

509; Brasted v. Sutton, 29 N. J. Eq. 513; Losey v. Simpson, 11 N. J. Eq. 246.

For the same reason a purchase money mortgage has precedence of mechanics' liens placed upon a building between the execution of the contract of purchase and the conveyance, although the conveyance and mortgage are made when the building is almost finished.¹

But although executed and delivered at the same time, so that they take effect upon the estate at the same instant, if the recording of the purchase money mortgage is delayed and the other is first recorded, it will, in the absence of any notice of the purchase money mortgage, be held to be superior in right.²

569. The English doctrine of tacking³ has no application to registered mortgages. These are payable according to the priority of their record.⁴ Another kind of tacking arises when the mortgagee attaches to the mortgage lien other debts not included in the mortgage. This he may do, so far as the mortgagor is concerned, when an express or implied agreement exists allowing him to do so; but he cannot tack other debts to his mortgage as against intervening mortgagees and judgment creditors.⁵

¹ *Gibbs v. Grant*, 29 N. J. Eq. 419; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Lamb v. Cannon*, 38 N. J. L. 382; *Strong v. Van Deusen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242.

² *Dusenbury v. Hulbert*, 2 *Thomp. & C.* (N. Y.) 177.

³ Tacking in England was abolished by the Vendor and Purchaser Act of 1874. The dimensions to which the learning on this subject had grown may be gathered from the fact that in Mr. Coventry's edition of *Powell on Mortgages*, published in 1822, it occupies one hundred and twenty-five pages.

⁴ See §§ 357, 360; *Grant v. U. S. Bank*, 1 *Caines Cas.* (N. Y.) 112; *Wing v. McDowell*, *Walk.* (Mich.) 175; *Chandler v. Dyer*, 37 *Vt.* 345.

It is prohibited by statute in Georgia. Code, 1873, § 1962. See § 1082.

⁵ *Orvis v. Newell*, 17 *Conn.* 97; *Colquhoun v. Atkinsons*, 6 *Munf.* (Va.) 550; *Siter v. M'Clanachan*, 2 *Gratt.* (Va.) 280; *Towner v. Wells*, 8 *Ohio*, 136; *Hughes v. Worley*, 1 *Bibb* (Ky.), 200; *Chase v. M'Donald*, 7 *Har. & J.* (Md.) 160; *Averill v. Guthrie*, 8 *Dana* (Ky.), 82.

CHAPTER XIII.

NOTICE AS AFFECTING PRIORITY.

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| II. Actual notice, 578-583. | VII. Fraud as affecting priority, 602, 603. |
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1. *Notice as affecting Priority under the Registry Acts.*

570. In general. — Under the local registry acts in England, it has always been conceded that notice of a prior deed would supersede the effect of a prior registry.¹ The preamble of the statute of the 7th of Anne, providing for a registry in the county of Middlesex, recites in substance that, "by the different and secret ways of conveying lands, such as are ill-disposed have it in their power to commit frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by prior and secret conveyances and fraudulent incumbrances;" and therefore it is enacted that a memorial of conveyances, made after the 27th of September, 1709, of lands in that county, may be registered; and that every deed "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered, as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." In a leading case involving the construction of this act, Lord Hardwicke asks, what appears by the preamble to be the intention of the act? "Plainly,"

¹ The registry acts of England are as follows: West Riding of Yorkshire, 5 Anne, c. 18; East Riding of Yorkshire and Kingston-on-Hull, 6 Anne, c. 35; Middlesex, 7 Anne, c. 20; and North Riding of Yorkshire, 8 Geo. 2, c. 6. Under the Irish Registry Act, 6 Anne, c. 2, which is materially different from the English, the record gives absolute priority, and the doctrine of notice is not admitted. *Bushell v. Bushell*, 1 Sch. & Lef. 90, 98.

he answers, "to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced."¹ After referring to several cases on the registry acts,² he continues: "Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this, that the taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate. . . . Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum*. It is a maxim, too, in our law, *Fraus et dolus nemini patrocianari debent*." Fraud or bad faith, therefore, is the ground on which the court, in this as well as in other cases, place the doctrine of notice as modifying the registry acts.³

571. The policy of the doctrine of notice, as laid down by Lord Hardwicke and repeatedly affirmed in England, has been the subject of some criticism;⁴ and regret has been expressed that the doctrine has so far superseded the terms of the registry acts. In *Davis v. Strathmore*,⁵ Lord Eldon said: "With regard to the observation thrown out at the bar, that the registry acts

¹ *Le Neve v. Le Neve*, 1 Ambler, 436; *White & Tudor's Lead. Cas.* vol. ii. p. 109, 4th Am. ed.; and see *Neal v. Kerrs*, 4 Ga. 161.

² *Forbes v. Deniston*, 2 Bro. P. C. 425; *Blades v. Blades*, 1 Eq. Cas. Abr. 358, pl. 2; *Cheval v. Nichols*, 1 Stra. 664.

³ And see, also, *Hine v. Dodd*, 2 Atk. 275; *Tunstall v. Trappes*, 3 Sim. 287, 301; *Cheval v. Nichols*, 1 Stra. 664. In the latter case it was said: "For where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and in a court of equity his purchase will never be established."

⁴ *Benham v. Keane*, 7 Jur. N. S. 1096; 1 John. & H. 685, and cases cited.

⁵ 16 Ves. 419. See, also, *Ford v. White*, 16 Beav. 123; *Wyatt v. Barwell*, 19 Ves. 435, 438. In the latter case Sir Wm. Grant said: "It has been much doubted whether courts ought ever to have suffered the question of notice to be agitated as against a party who has duly registered his conveyance; but they have said, 'We cannot permit fraud to prevail; and it shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected.'"

were overturned by Lord Hardwicke, I should feel myself bound to consider those decisions right if they rested upon his authority alone ; but, confirmed as that doctrine has been ever since his time in cases directly upon those acts, and admitted to be right in questions upon other acts of parliament, I dare not venture to contradict it." In a recent case before the Court of Appeal¹ in chancery, the Chancellor, Lord Hatherley, after referring to the case of *Le Neve v. Le Neve* with approbation, said : " Whether it be prudent or imprudent that the law should continue in that state is not a matter which I have to discuss on the present occasion. Some think that the law should be rendered like that relating to ship registry ; but ship registers are of a very different character, and how far one rule or the other is right is not a matter which it is easy for anybody to determine. What has hitherto repressed those who have been anxious to do away with this doctrine of notice is, that there would always remain a very strong feeling on the part of mankind against a person who, knowing distinctly that his neighbor had lent a large sum of money, took a security subject to that, and then obtained priority by a previous registration, doing that which, as I held in *Benham v. Keane*,² this court will not allow to be done. This court will not allow a man who has already pledged his estate to pledge it a second time, and will not allow any person to assist him in so doing, by lending a second sum of money in this way."

572. The doctrine of notice as affecting priority is generally adopted in this country. Subsequent purchasers, who have notice of a prior unrecorded mortgage, are affected by their knowledge of it in the same way that the prior record of the mortgage would affect them.³ The record is constructive notice only ; but it is notice to all the world that comes after. Any other notice must in the nature of things be limited in the extent of it, but, so far as it goes, its effect is equitably not any less, certainly, than that of the record. Having notice of a mortgage defectively recorded, or not recorded at all, a subsequent pur-

¹ *Rolland v. Hart*, L. R. 6 Ch. App. 678, and see numerous cases cited. *Ogden*, 6 B. Mon. (Ky.) 606 ; *Lambert v. Nanny*, 2 Munf. (Va.) 196 ; *Butler v. Viele*, 44 Barb. (N. Y.) 166 ; *Fort v. Burch*, 5 Den. (N. Y.) 187 ; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260 ; *Musgrove v. Bonser*, 5 Oregon, 313 ; *Huebsch v. Scheel*, 81 Ill. 281 ; *Maxwell v. Brooks*, 54 Ind. 98 ; *Morrill v. Morrill*, 53 Vt. 74.

² 1 John. & H. 685 ; S. C. 7 Jur. (N. S.) 1096.

³ *Conover v. Von Mater*, 18 N. J. Eq. 481 ; *Bell v. Thomas*, 2 Iowa, 384 ; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469 ; *Woodworth v. Guzman*, 1 Cal. 203 ; *Nelson v. Dunn*, 15 Ala. 501 ; *Underwood v.*

chaser cannot claim priority for his own deed.¹ As between him and the mortgagee, it is the same as if the prior mortgage had been duly recorded.² Therefore, priority among mortgagees and grantees depends not only upon the date of their deeds and the date of their record, but also upon the knowledge they have of the true state of the facts as to the title, and of the rights and equities of those who have not fixed their priority by duly recording their deeds.³

Undoubtedly it was the purpose of the laws providing for the registry of conveyances of land to enable every one by this means to determine fully the title to the land, without depending upon the possession of the title deeds, or upon inquiry or notice outside of the registry. The symmetry of the registry system has been disturbed and broken in upon by judicial construction, in order to prevent a fraudulent use of the statute, which it is to be presumed the statute did not intend. To allow one who has actual or implied notice of a prior unrecorded deed of the same property, or such notice of equitable rights of other persons in the property, to obtain priority by recording his own deed, would be to enable him to take advantage of the registry laws to obtain an unfair or fraudulent advantage by means of them. Exceptions to the literal application of the law have therefore been engrafted upon it to meet the equitable consequences of such notice.⁴

573. Exceptions as to Ohio and North Carolina. — As already noticed, it has been questioned whether the courts ought ever to have suffered the question of actual notice to be agitated against one whose conveyance is duly registered.⁵

The basis of the doctrine of notice is, that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance or incumbrance of which he has knowledge.⁶ But it has been doubted whether this doctrine does not give occasion

¹ *Johnston v. Canby*, 29 Md. 211; *Coe v. Winters*, 15 Iowa, 481; *Forepaugh v. Appold*, 17 B. Mon. (Ky.) 625; *Johnson v. Badger Mill & Mining Co.* 13 Nev. 351.

² *Copeland v. Copeland*, 28 Me. 525; *Smallwood v. Lewin*, 15 N. J. Eq. 60; *Ohio Life Ins. & Trust Co. v. Ross*, 2 Md. Ch. Dec. 25; *Smith v. Nettles*, 13 La. Ann. 241; *Pike v. Armstead*, 1 Dev. (N. C.) Eq. 110; *Solms v. McCulloch*, 5 Pa. St. 473; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260.

³ *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Vredenburg v. Burnet*, 31 N. J. Eq. 229.

⁴ See *Hart v. Farmers' & Mechanics' Bank*, 33 Vt. 252, per Chief Justice Redfield.

⁵ Per Sir Wm. Grant, in *Wyatt v. Barwell*, 19 Ves. 435, 439; per Colcock, J., in *Price v. White, Bailey Eq.* (S. C.) 240.

⁶ *Harrington v. Allen*, 48 Miss. 492.

to more fraud than it prevents; and whether vigilance in recording a mortgage should not be rewarded as much as vigilance in obtaining it.¹

Under the registration law in North Carolina it is held that no notice, however full and formal, will supply the place of registration of a deed of trust or mortgage; the statute declaring that they shall not be valid at law to pass any property as against creditors or purchasers for a valuable consideration but from their registration.²

Under the recording acts of Ohio it is held that the doctrine of notice has no place, but that mortgages have priority of lien in the order of their delivery for record, whatever notice a mortgagee may have of a prior unrecorded mortgage or other conveyance.³ Inasmuch as a mortgage is declared to take effect only from the time it is left for record, a judgment recovered after the date of the mortgage, and before it is recorded, takes precedence of it.⁴

The admission of evidence of actual notice of a prior unrecorded deed, as affecting a mortgagee's right of priority, is attended with all the danger and uncertainty incident to parol evidence, when used for the purpose of affecting written instruments and disturbing titles, and for this reason the policy has been adopted in these states of allowing the whole question of priority to be settled by the simple fact of prior registry. This furnishes a clear and certain standard of decision incapable of variation, and thus avoids a very fruitful source of litigation.⁵

574. It may happen that a purchaser or mortgagee, though holding title in good faith under a regular chain of recorded conveyances, may yet have no title at all, for the reason that there is no difference between the effect of the constructive notice derived from the recording of a deed, and an actual notice, so far as respects the person receiving such actual notice, and that a grantor in the chain of title had knowledge, when he took the conveyance to himself, of a prior unrecorded mortgage or con-

¹ Per Hitchcock, J., in *Mayham v. Coombs*, 14 Ohio, 428.

² *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. (N. C.) Eq. 584; *Leggett v. Bullock*, Busb. (N. C.) L. 283.

³ *Stansell v. Roberts*, 13 Ohio, 148; *Mayham v. Coombs*, 14 Ib. 428; *Bloom*

v. Noggle, 4 Ohio St. 45; *Bercaw v. Cockerill*, 20 Ohio St. 163, and cases there cited. And see *Astor v. Wells*, 4 Wheat. 466.

⁴ *Mayham v. Coombs*, 14 Ohio, 428.

⁵ Per Ranney, J., in *Bloom v. Noggle*, 4 Ohio St. 45.

veyance, which was, however, recorded before his own conveyance or mortgage to his grantee.¹ "Suppose, for instance," says Chief Justice Shaw, in an important case on this subject,² "A. conveys to B., who does not immediately record his deed. A. then conveys to C., who has notice of a prior unregistered deed to B. C.'s deed, though first recorded, will be postponed to the prior deed to B. Then, suppose B. puts his deed on record, and afterwards C. conveys to D. If the above views are correct, D could not hold against B.: not in right of C., because, in consequence of actual knowledge of the prior deed, C. had but a voidable title; and not in his own right, because, before he took his deed, B.'s deed was on record, and was constructive notice to him of the prior conveyance to B. from A. under whom his title is de-

¹ This point is illustrated by the case of *Van Rensselaer v. Clarke*, 17 Wend. (N. Y.) 25. Derick Schuyler owned the premises in question on the 25th of August, 1794. He that day conveyed them to James Van Rensselaer, but the deed was not recorded until January 2, 1804. July 2, 1799, Derick Schuyler conveyed the same premises to Philip Schuyler, who had notice of the unrecorded deed to James Van Rensselaer. The deed to Philip Schuyler was recorded October 25, 1802. On the 2d of April, 1805, Philip Schuyler conveyed to Clark, who, in 1806, conveyed to Emott, who, in 1833, conveyed to Miller. The court held that Philip Schuyler was a *bond fide* purchaser; that the deed to Van Rensselaer being recorded before the deed from Philip Schuyler to Clark, the latter took the land chargeable with notice of the deed to Van Rensselaer; that although neither Clark, Emott, or Miller had actual notice or knew of the deed from Derick Schuyler to Van Rensselaer, and although upon the examination of the records they found a regular recorded title in their respective grantors, yet the records informed them that Derick Schuyler had conveyed the premises to Van Rensselaer previously to the conveyance to Philip Schuyler. It was argued that Clark bought of Philip Schuyler on the faith of finding that his deed was first recorded, and that he should not be held to look further and

run the hazard of actual notice to Philip Schuyler. But it was held otherwise by the court; which decided that, to entitle a purchaser to protection under the recording acts, he must not have notice which is inconsistent with good faith.

These principles have been affirmed in *Schutt v. Large*, 6 Barb. (N. Y.) 373; *Ring v. Steele*, 3 Keyes (N. Y.), 450; *Jackson v. Post*, 15 Wend. (N. Y.) 588.

The following case is still later. On the 10th day of April, 1871, A., the owner of certain lands, mortgaged them for \$3,000 to B., who, on the 25th of July, 1871, delivered the same to C., and on the 28th of October, 1871, executed to him a formal assignment, which, with the mortgage, was recorded January 2, 1872. On September 13, 1871, A. conveyed the premises to D., who had actual knowledge of the mortgage to B., and of the consideration he had paid for it. This deed was recorded October 5, 1871. On the 16th of January, 1873, D. executed a mortgage upon the premises to E. for \$2,000, who assigned it to F., who had no notice of the first mortgage, except such constructive notice as was given by the record. It was held that when C. put the first mortgage on record, January 2, 1872, it was a complete and perfect title, and that the lien acquired by F., under the second mortgage, was subsequent to it. *Goelet v. McManus*, 1 Hun (N. Y.), 306.

² *Flynt v. Arnold*, 2 Met. (Mass.) 619.

rived. But in such case, if before B. recorded his deed C. had conveyed to D. without actual notice, then D., having neither actual nor constructive notice of the prior deed, would take a good title. And as D. in such case would have an indefeasible title himself against B.'s prior deed, so, as an incident to the right of property, he could convey a good and indefeasible title to any other person, although such grantee should have full notice of the prior conveyance from A. to B. Such purchaser, and all claiming under him, would rest on D.'s indefeasible title, unaffected by any early defect of title, by want of registration, which had ceased to have any effect on the title, by a conveyance to D. without notice, by one having a good apparent record title." The eminent judge examines the earlier cases in Massachusetts which were in conflict with these views, and in which it had been considered that the recording of the first deed, under the circumstances above supposed, might be evidence of actual notice to such purchaser thus taking his deed from the second grantee, but that it did not constitute that constructive notice which would be conclusive in favor of the first grantee. This is founded wholly on the suggestion made in one case, that "When a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further."¹ Referring to this proposition as incorrect, Chief Justice Shaw continues: "If the object of any one, in searching the record to ascertain the goodness of a title, is to inquire and ascertain whether any one through whom the title is derived, whilst he had the title, and had the power to aliene or incumber it, did so, then, by following the conveyances down from each former holder of the estate to the time of the search, he could find the alienation or incumbrance, if one had been made and recorded. The object of the registry is to give notoriety to all conveyances, and make them certainly known to one inquiring. If an ordinarily diligent search would bring the inquirer to a knowledge of a prior incumbrance or alienation, then he is presumed to know it. It is this presumption, and not the fact of actual knowledge of a prior incumbrance, which binds all subsequent purchasers, and

¹ Per Jackson, J., in *State v. Bradish*, 14 Mass. 296, 303. The head-note in this case states a correct proposition of law, but in point of fact, in that case, the first mortgagee had put his deed on record before the assignment was made by the second mortgagee. But the court

treated this as only evidence to go to the jury, tending to show that the assignee of the second mortgage had actual notice of the prior mortgage, and not as being constructive notice. And see *Trull v. Bigelow*, 16 Mass. 406; *Glidden v. Hunt*, 24 Pick. (Mass.) 221.

makes the registry conclusive evidence of notice. It serves all the purposes of actual knowledge, by enabling an inquirer with ordinary diligence to ascertain the fact. It would seem that a search, so far as to ascertain whether any former proprietor, whilst he had the estate, had aliened or incumbered it, would be necessary, in order to render the public registry available to the full extent to which it was designed by law; and therefore it would be reasonable to presume in each case that such search had been made, and if any such deed from a proprietor was on record, that it had been discovered, and was known to the subsequent purchaser."

575. The right of the first purchaser or mortgagee to preserve his title, by recording his deed, continues after any number of subsequent conveyances in the chain of title derived from the second grantee from the original grantor, although the deeds in this chain of title have all been duly recorded, provided that such subsequent purchasers, one and all, have bought either with knowledge of the prior unrecorded deed or without paying valuable consideration. So long as this state of things continues the prior title will hold, and may be perfected by record. But so soon as any one in the chain of title under the second conveyance purchases in good faith for a valuable consideration, and places his deed on record, the title under the first unrecorded deed is gone forever.¹

¹ This point is fully illustrated in the case of *Fallass v. Pierce*, 30 Wis. 443, which was several times argued before the court, and was finally decided in a well considered opinion by Chief Justice Dixon. Using the same illustration given above, he says: "If, for example, in the case supposed, C. took his deed with knowledge of the prior conveyance to B., and had then conveyed to D., who had like knowledge, and D. should convey to E., and so on, conveyances should be executed to the end of the alphabet, each subsequent grantee having knowledge of B.'s prior right, and all of their conveyances being recorded, yet then, if B. should record his deed before the last grantee with knowledge, and Z. should make conveyance, the purchaser from Z. would be bound to take notice of B.'s rights, and of the relations existing between them, and all the subsequent pur-

chasers from C. to Z. inclusive. And in the same case, if Z. should sell to a purchaser in good faith for value from him, yet if B. should get his conveyance recorded before that of such purchaser, his title would be preferred, because of such first record.

"And it is manifest that the same result would follow if in the case supposed none of the subsequent grantees, from C. to Z. inclusive, paid any valuable consideration for the land, or if, in the case of each successive grantee, his title was defective and invalid as against B., either by reason of his knowledge of B.'s title or because he was a mere volunteer, paying no consideration whatever for the conveyance." See *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. vol. 2, pt. 1, p. 212, for a dissent to this line of decisions, because they make it requisite to search for conveyances from two persons

This class of cases very frequently presents questions of the greatest difficulty; and the language of Lord Chancellor Northington is generally applicable to any one of them: "This is one of those cases which are always very honorably labored by the counsel at the bar, and determined with great anxiety by the court, as some of the parties must be shipwrecked in the event."¹

576. As a general rule a purchaser is not bound to search the records for incumbrances as against a title that does not appear of record.² Generally, therefore, the record of any mortgage prior to the conveyance by which the mortgagor took his title is no notice of the incumbrance to a subsequent purchaser.³ The whole object of the registry acts is to protect subsequent purchasers and incumbrancers against previous conveyances which are not recorded, and to deprive the holder of previous unregistered conveyances of his right of priority, which he would have at the common law. The title upon record is the purchaser's protection. The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed. When one link in the chain of title is wanting, there is no clue to guide the purchaser in his search to the next succeeding link by which the claim is continued. When the purchaser has traced the title down to an individual, out of whom the record does not carry it, the registry acts make that title the purchaser's protection.⁴

Yet, the circumstances may be such that a purchaser will be bound to search the records for incumbrances as against a title which does not appear upon the records; as, for instance, when he has actual notice of the existence of a mortgageable estate in one prior to the date of his title to an absolute fee. One in pos-

during the same period. The authorities cited in support of this view are the earlier cases in Massachusetts and Wisconsin now overruled.

In *Day v. Clark*, 25 Vt. 397, 402, the rule is laid down that the record of the prior deed after the second is notice to a purchaser from the vendee in the second that there is such a prior deed; but the record of it is no notice that the vendee in the second deed, at the time he secured it, had notice of the first deed, and without such notice the title of the purchaser from the vendee in the second, but first recorded deed, would not be affected by the fraud or knowledge of his vendor.

The doctrine of the text is also supported by *English v. Waples*, 13 Iowa, 57; *Sims v. Hammond*, 33 Iowa, 368.

¹ See *Stanhope v. Verney*, 2 Eden, 81.

² *Cook v. Travis*, 20 N. Y. 400, 402; *Losey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246.

³ *Calder v. Chapman*, 52 Pa. St. 359; *Wing v. McDowell*, Walk. (Mich.) 175; *Farmers' Loan & Trust Co. v. Maltby*, 8 Paige (N. Y.), 361.

⁴ Per Chancellor Williamson, in *Losey v. Simpson*, 11 N. J. Eq. (3 Stockt.) 246; and see *Cook v. Travis*, 20 N. Y. 400, 402; *Parkist v. Alexander*, 1 Johns. (N. Y.) Ch. 394, 398.

session of land under a contract of sale, though the contract be by parol, has a mortgageable interest, and a mortgage of it may be legally and properly recorded, so as to take precedence of a subsequent conveyance of the property, if the subsequent purchaser had actual notice of the existence of a mortgageable estate in the mortgagor prior to his receiving an absolute deed of the land.¹

A recital in a deed that the grantee had been in possession of the granted farm since a given date, several months prior to the deed, under a contract for the purchase of it, is actual notice to one claiming under the title of such deed, that the grantee had been in possession before he received a deed of the land; and the law charges him with notice that such grantee had, during such possession, a mortgageable interest in the land; and he is bound to search the records for incumbrances against the title from the time the grantee entered into possession under his contract, and he is bound by a mortgage made by such grantee while in possession under the contract of sale and before receiving a deed.²

577. Notice of a secret trust. — It is frequently the case that an estate which appears by the record to be absolutely the property of the grantee is in fact held by him in trust for another person. In such case, any one who deals with him in respect to this estate, with knowledge of the trust, takes it subject to the trust, and a mortgagee with such knowledge will be required to discharge the lien.³ If the conveyance, though absolute in form, be in fact a mortgage, a purchaser, with knowledge of this fact, takes the estate subject to the mortgage. "Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust."⁴

¹ *Crane v. Turner*, 7 Hun (N. Y.), 357.

² *Crane v. Turner*, *supra*. Mr. Justice Follett, by way of illustration, said: "If, January first, a grantee receives a deed and enters into possession, but neglects to record the deed, or it is destroyed, and subsequently he receives a new deed bearing a later date and reciting that it is confirmatory of a deed dated January first, under which he has been in possession since that date, and which deed has been

lost, it would not be held that a search back to the date of the confirmatory deed was due diligence in a person who had actual notice of the recital, even though accompanied by inquiry of the grantee; and if he should take a mortgage and record it, it would not have precedence over a duly recorded mortgage given between the dates of the first and second deeds."

³ *Harwood v. Pearson*, 122 Mass. 425.

⁴ *Saunders v. Debew*, 2 Vern. 271.

One who acquires the legal title to land with notice of an equitable mortgage in another will be decreed to hold the legal title for the benefit of the equitable mortgagee.¹

2. Actual Notice.

578. There are three kinds of notice: actual, implied, and constructive. As the doctrine of notice as affecting the priority of incumbrances arises from the equitable view that it is fraud in one, who has notice of an adverse claim in another, to attempt to acquire a title to the prejudice of the interest of which he has been made aware, it is obvious that the actual culpability involved by the notice must depend altogether upon the kind and degree of notice received. Yet the legal consequences are the same, whatever the kind and degree of the notice may be, provided the notice is imputed at all.

579. Actual notice, of course, means direct personal knowledge.² Whether it exists in any particular case, and whether it is sufficient to charge the party whom it is sought to affect by it, is a question of fact to be considered and determined upon the evidence in each particular case. It is deemed effectual and sufficient when the evidence shows that the matters relating to the prior claim or interest of another, constituting notice of it, are brought distinctly to the knowledge and attention of the person it is sought to affect.³

Actual notice may be verbal or written;⁴ it may be intended or accidental;⁵ it may affect an infant or *feme covert* as well as an adult man;⁶ a *cestui que trust* is bound by notice to the

¹ Gale v. Morris, 29 N. J. Eq. 222.

² Story's Eq. Jur. § 399; Lamb v. Pierce, 113 Mass. 72; Crassen v. Swove-land, 22 Ind. 427; Rogers v. Jones, 8 N. H. 264; Williamson v. Brown, 15 N. Y. 354; Baltimore v. Williams, 6 Md. 235.

The statutes of Massachusetts provide that no unrecorded deed shall be valid, save as against the grantors and persons having "actual notice thereof." By actual notice is not meant necessarily that a person must actually have seen or been told of the deed by the grantor, but it means any intelligible information of it, either verbal or in writing, coming from a source which a party ought to give heed to. Curtis v. Mundy, 3 Met. 405; George

v. Kent, 7 Allen, 16. This provision was first adopted in the Rev. Stat. of 1836, before which time implied or constructive notice was held to be sufficient, but now has no effect. Parker v. Osgood, 3 Allen, 487; and see Lawrence v. Stratton, 6 Cush. 163, 166; Pomroy v. Stevens, 11 Met. 244; Dooley v. Wolcott, 4 Allen, 406; Sibley v. Leffingwell, 8 Allen, 584.

³ Robinson's Law of Priority, p. 27; Michigan Mut. L. Ins. Co. v. Conant, 40 Mich. 530; Vest v. Michie, 31 Gratt. (Va.) 149.

⁴ North Brit. Ins. Co. v. Hallett, 7 Jur. (N. S.) 1263.

⁵ Smith v. Smith, 2 Crompt. & M. 231.

⁶ Fisher on Mort. 3d. ed. p. 548.

trustee;¹ notice to one of several partners is notice to the partnership;² and notice to one of several trustees is generally sufficient.³

Implied or constructive notice of an unrecorded deed does not affect a subsequent purchaser who is protected by a statute requiring actual notice. The courts even go so far as to hold that although a purchaser has knowledge that the lands had been sold and purchased by another person, yet if no deed had been recorded and the purchaser had no knowledge that a deed had been made, he is not chargeable with actual notice.⁴ Therefore proof of open and notorious occupation and improvement, or of other facts which would reasonably put a purchaser upon inquiry, are not sufficient; but one claiming under an unrecorded deed must prove that the subsequent purchaser had actual knowledge of some claim or right of the person holding possession, or actual knowledge or notice of the unrecorded deed. This construction of the requirement of *actual notice* to affect a subsequent purchaser gives full effect to the words, and is in accordance with the definition of them given by the best writers. This construction, moreover, gives full effect to the registry laws, and enables purchasers to rely upon them fully and implicitly without searching the outside world to ascertain the true state of the title. It simply requires, of all persons who hold or claim any interest in real estate, that they shall use due care and diligence in placing their rights beyond all danger by obtaining and putting upon record proper deeds.

It is true, however, that in several states in which there are statutes requiring actual notice to affect a purchaser, a less strict interpretation of the word is adopted; and while actual notice of an unrecorded deed is distinguished from mere notice such as would be imputed from actual, open, and visible occupation, whether known to the purchaser or not, yet the words are held to include constructive knowledge imputed from actual, open, and visible occupation, where such occupation is in fact known to the purchaser.⁵ Notice is regarded as actual when the purchaser either knows of the existence of the adverse claim of title, or is conscious of having the means of such knowledge.⁶

¹ *Wise v. Wise*, 2 Jones & Lat. 403.

² *Travis v. Milne*, 9 Hare, 141.

³ *Meux v. Bell*, 1 Hare, 73.

⁴ *Lamb v. Pierce*, 113 Mass. 72.

⁵ § 263. In *Brinkman v. Jones*, 44 Wis.

498, this view is ably presented and the authorities in support of it collected. See, also, *Cunningham v. Brown*, 44 Wis. 72.

⁶ *Speck v. Riffin*, 40 Mo. 405; *Mich.*

Mut. L. Ins. Co. v. Conant, 40 Mich. 530.

580. The degrees and kinds of actual notice are of course without number, ranging from a formal written statement of the lien, giving all its detail, to a mere verbal declaration of the fact of its existence; it may be one given expressly as a notice, or it may have come in an accidental way. But neither the manner of the notice nor the purpose of it is material.¹ The degree of the notice, however, is material. "Flying reports are many times fables and not truth."² "A mere rumor that some other person claims an interest in the property will not affect a person with notice of such interest."³ Generally such notice, to be binding, must proceed from some person interested in the property.⁴ This latter proposition has, however, been questioned; and it is said that if the information be derived from any other source entitled to credit, and it be definite, it will be equally binding as if it came from the party himself.⁵

Notice of an intention on the part of the owner of property to execute a lien upon it does not prevent the person having such notice from taking a valid incumbrance upon it. But where a prior mortgage, which was intended to be a conveyance in fee, was by mistake, as executed, only a conveyance for life, and a second mortgagee had such actual notice of it as induced him to believe that the mortgage was in fee, it was, as against him, held to be a mortgage in fee.⁶

A creditor may by his vigilance secure his demand, if possible, by taking a mortgage from his debtor, just as he might by an attachment, although he knew that another creditor intended to make an attachment in the one case, or to take a mortgage in the other, and had taken steps for effecting this.⁷

The burden of proof is upon the person who claims priority, and charges another with notice of his own incumbrance, to make out affirmatively that the other had such notice.⁸ The mere fact

¹ *Smith v. Smith*, 2 Crompt. & M. 231; P. C. 18, 36; *Rogers v. Hoskins*, 14 North Brit. Ins. Co. v. Hallett, 7 Jur. N. S. 1263; Ga. 166; *Lamont v. Stimson*, 5 Wis. 443; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142, 155; *Peebles v. Reading*, 8 S. & R. 484, 496.

² *Wildgoose v. Wayland*, Gouldsb. 147, pl. 67, per Lord Keeper Egerton; and see *Butler v. Stevens*, 26 Me. 484; *Doyle v. Teas*, 4 Scam. (Ill.) 202.

³ *Jolland v. Stainbridge*, 3 Ves. Jr. 478; *Jaques v. Weeks*, 7 Watts (Pa.), 261, 267; *Wilson v. McCullough*, 23 Pa. St. 440.

⁴ *Natal Land Co. v. Good*, 2 L. R. P. C. 121; *Barnhart v. Greenshields*, 9 Moore

⁵ *Mulliken v. Graham*, 72 Pa. St. 484, 490; *Curtis v. Mundy*, 3 Met. (Mass.) 405, 407.

⁶ *Gale v. Morris*, 30 N. J. Eq. 285; S. C. 7 Reporter, 436.

⁷ *Warden v. Adams*, 15 Mass. 233.

⁸ *Hardy, Ex parte*, 2 D. & C. 393; *Fort v. Burch*, 6 Barb. N. Y. 60, 78; *Center v.*

that one who was a witness to an unrecorded mortgage afterwards became the purchaser of the land from the mortgagor is not sufficient to affect him with notice of the mortgage.¹

Notice to supply the place of registry must be more than what is barely sufficient to put the party upon inquiry.² To break in upon the registry acts, it must be such as will, with the attending circumstances, affect the party with fraud.³ The notice must be clear and undoubted;⁴ and when that is the case it is regarded as *per se* evidence of fraud for one to attempt to defeat a prior incumbrance by setting up a subsequent deed.⁵ It is sufficient if it comes within the rule, *Id certum est, quod certum reddi potest*. The facts disclosed amount to notice when they are such as *render it incumbent* on the purchaser or mortgagee to inquire, and at the same time enable him to prosecute the inquiry successfully.⁶ If in such case he wilfully closes his eyes and remains ignorant of facts he would ascertain by a reasonable inquiry, he is affected with notice of them just as much as he would be had he made the inquiry.⁷

581. Notice has effect if received at any time before completion of the trade. A subsequent purchaser is bound by notice of a prior unrecorded mortgage, although not received till after he has agreed upon the terms of the trade, if received before he has actually paid the consideration, or in any way put himself to disadvantage by a partial completion of the transaction.⁸ But after the sale is completed by the payment of the consideration, notice of a prior mortgage is without effect.⁹

If a mortgagee has notice of a prior unrecorded mortgage before paying over the money secured by his mortgage, he takes

Planters' & Merchants' Bank, 22 Ala. 743; McCormick v. Leonard, 38 Iowa, 272; Miles v. Blanton, 3 Dana (Ky.), 525; Van Wagenen v. Hopper, 8 N. J. Eq. (4 Halst.) 684, 707; Marshall v. Dunham, 66 Me. 539; Vest v. Michie, 31 Gratt. (Va.) 149.

¹ Vest v. Michie, *supra*.

² Jackson v. Van Valkenburgh, 8 Cow. (N. Y.) 260; Williamson v. Brown, 15 N. Y. 354, and cases cited; Reed v. Gannon, 50 N. Y. 345; and see Webster v. Van Steenberg, 46 Barb. (N. Y.) 211.

³ Dey v. Dunham, 2 Johns. (N. Y.) Ch. 182; Jackson v. Burgott, 10 Johns. (N. Y.) 457; Vest v. Michie, 31 Gratt. (Va.) 149.

⁴ Hine v. Dodd, 2 Atk. 275; West v. Reid, 2 Hare, 249.

⁵ Dunham v. Dey, 15 Johns. (N. Y.) 555.

⁶ Spofford v. Weston, 29 Me. 140; Parker v. Kane, 4 Wis. 1; Nute v. Nute, 41 N. H. 60.

⁷ Blaisdell v. Stevens, 16 Vt. 179, 186; Bunting v. Ricks, 2 Dev. & Bat. (N. C.) Eq. 130; and see White & Tudor's Lead. Cas. 4th Am. ed. vol. 2d, pt. 1, pp. 152-155.

⁸ Beckett v. Cordley, 1 Bro. C. C. 353; English v. Waples, 13 Iowa, 57.

⁹ Syer v. Bundy, 9 La. Ann. 540; Jamison v. Gjemenson, 10 Wis. 411; Lynch v. Hancock, 14 S. C. 66.

subject to the unrecorded mortgage, though his own mortgage has already been recorded.¹

Lord Hardwicke is reported to have held that a purchaser having notice of a prior interest after payment of the purchase money, but before conveyance, is not entitled to protection, for the reason that some suspicion arises from his not taking the legal estate at the time when the money is paid.² But the decision is at variance with all other cases on this point; and the law at the present day upon the subject is undoubtedly expressed in the dictum of Lord Thurlow, that "the time when the money was advanced is that at which the notice is material."³ And in the later saying of Lord Hatherley, that "in itself it is immaterial whether the purchaser knows or not that another had an equitable interest prior to his own, provided he did not know that fact on paying his purchase money."⁴

A mortgagee cannot escape the effect of a notice he has received of a previous lien by having forgotten it at the time he took the mortgage.⁵

582. One with notice may acquire a good title from one without notice. The rule, that one purchasing or taking a mortgage of property with notice of some prior adverse claim to, or interest in, such property takes subject to such interest, is subject to the limitation that if a person with such notice acquires a legal title to the property from one who is without such notice, he is entitled to the same protection as his vendor, "as otherwise it would very much clog the sale of estates."⁶ Therefore, if a person takes a mortgage or other conveyance with notice of a prior incumbrance, but takes it from one who purchased without such notice, and therefore acquired a title good against such incumbrance, such subsequent mortgagee with notice may shelter himself under the protection which the law affords his grantor; he takes the latter's rights.⁷

One who takes a second mortgage, with notice of a prior un-

¹ *Schultze v. Houfes*, 96 Ill. 335.

² *Hardingham v. Nichols*, 3 Atk. 304; *Wigg v. Wigg*, 1 Atk. 382; and see *Mackreth v. Symmons*, 15 Ves. 329, 335, per Sir S. Romilly; S. C. 2 Dart Vend. & P. 4th ed. 760; *Rayne v. Baker*, 1 Giff. 241.

³ *Becket v. Cordley*, *supra*.

⁴ *Pilcher v. Rawlins*, L. R. 7 Ch. App. 259.

⁵ *Hunt v. Clark*, 6 Dana (Ky.), 56.

⁶ *Lowther v. Carlton*, 2 Atk. 242;

Brandlyn v. Ord, 1 Atk. 571; *Harrison v. Forth*, Prec. Ch. 51; *Sweet v. Southcote*, 2 Bro. Ch. 66; *Cook v. Travis*, 22 Barb. (N. Y.) 338; S. C. 20 N. Y. 400; *Varick v. Briggs*, 6 Paige (N. Y.), 323; *Bell v. Twilight*, 18 N. H. 159; *Boynton v. Rees*, 8 Pick. (Mass.) 329.

⁷ *Harrington v. Allen*, 48 Miss. 492; *Chance v. McWhorter*, 26 Ga. 315.

§§ 583, 584.] NOTICE AS AFFECTING PRIORITY.

recorded mortgage, is not the less a purchaser with notice, and subject to such mortgage, because he is at the same time informed that the debt secured by such mortgage is usurious.¹

A judgment creditor who has notice of an unrecorded mortgage holds his lien subject to the mortgage.²

It is no defence to one who takes a deed of land with actual knowledge on his part of a previous mortgage upon it, that the parties to the mortgage agreed that it should not be recorded, and the mortgagee received a written guaranty "to hold him harmless from any loss by reason of not recording the deeds."³

583. Another limitation to the rule of notice arises when a person without notice in good faith acquires a legal title from one who has notice of a prior equitable right.⁴ The last purchaser's "own *bona fides* is a good defence, and the *mala fides* of his vendor ought not to invalidate it." Therefore, although one who has notice of a prior unrecorded mortgage cannot himself purchase the land, or take a mortgage upon it, without its being subject to such unrecorded mortgage, yet if he sell the land or the mortgage to a purchaser in good faith before the record of the prior mortgage, the purchaser from him will acquire a title superior to the unrecorded mortgage; but should such purchaser omit to record his deed or assignment until the mortgage is recorded, he would stand in no better position than his assignor.⁵

In like manner an attaching creditor without notice of an unrecorded deed will hold the estate, although the debtor had notice of it.⁶

3. *Implied Notice.*

584. Notice to the principal is implied from notice to his agent. When an agent acquires a knowledge of any matters or instruments affecting the title of any lands, about the purchase or mortgage of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal; or, in other words, no-

¹ *Beverley v. Brooke*, 2 Leigh (Va.), 425. ⁵¹; *M'Queen v. Farquhar*, 11 Ves. 467, 478.

² See § 461; *Williams v. Tatnall*, 29 Ill. 553; *Thomas v. Vanlieu*, 28 Cal. 616; but see *Smith v. Jordan*, 25 Ga. 687.

³ *Lord v. Doyle*, 1 Cliff. 453.

⁴ *Mertins v. Joliffe*, Amb. 311, 313; and see, also, *Att'y Gen. v. Wilkins*, 17 Beav. 285, 293; *Harrison v. Forth*, Prec. Ch.

⁵ § 475; *Fort v. Burch*, 5 Denio (N. Y.), 187; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *Stroud v. Lockart*, 4 Dall. 153; *Harrington v. Allen*, 48 Miss. 492; *Westbrook v. Gleason*, 79 N. Y. 23, reversing S. C. 14 Hun, 245.

⁶ *Coffin v. Ray*, 1 Met. (Mass.) 212.

tice to the principal of such matters or instruments is implied.¹ Such notice is sometimes called constructive; but it is really implied from the identity of principal and agent, and not imputed by virtue of a construction placed upon their conduct or relation.

Notice to an agent, to bind the principal, must be brought home to the agent while engaged in the business and negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter.² The knowledge or notice of facts acquired by an attorney, while engaged in the business of his client, is knowledge or notice of them by the client himself.³

Where a solicitor induced a client to take a mortgage upon the lands of a third person, situate in the county of Middlesex, in England, and soon afterwards induced a second client to advance money on mortgage of the same lands, without informing him of the existence of the first mortgage, and the second mortgage was registered before the first mortgage was registered, it was held that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority.⁴ Lord Chancellor Hatherley said: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor."

585. "It is a moot question upon what principle this doc-

¹ *Fuller v. Benett*, 2 Hare, 394, and cases cited; *Williamson v. Brown*, 15 N. Y. 354, 359; *Hovey v. Blanchard*, 13 N. H. 145; *Bank of U. S. v. Davis*, 2 Hill (N. Y.), 451; *Josephthal v. Heyman*, 2 Abb. N. C. (N. Y.) 22; S. C. 8 N. Y. Weekly Dig. 61; *Walker v. Schreiber*, 47 Iowa, 529.

² *Pringle v. Dunn*, 37 Wis. 449; *May v. Borel*, 12 Cal. 91; *Haywood v. Shaw*, 16 How. (N. Y.) Pr. 119; *Fry v. Shehee*,

55 Ga. 208; *Houseman v. Girard Mut. Build. & Loan Association*, 81 Pa. St. 256; *Morrison v. Bausemer*, 32 Gratt. (Va.) 225.

³ *Jones v. Bamford*, 21 Iowa, 217; *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260. And see *Josephthal v. Heyman*, 2 Abb. N. C. (N. Y.) 22; S. C. 4 Cent. L. J. 368.

⁴ *Rolland v. Hart*, L. R. 6 Ch. App. 678.

trine rests," says Vice-Chancellor Kindersley.¹ "It has been held by some that it rests on this: that the probability is so strong that the solicitor would tell his client what he knows himself, that it amounts to an irresistible presumption that he did tell him; and so you must presume actual notice on the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is *alter ego* — he is myself; I stand in precisely the same position as he does in the transaction, and, therefore, his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable."

"In such a case," said Lord Chancellor Brougham,² "it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one as common to both, whether it be so in fact or not."

586. The notice must be in the same transaction. Notice to the agent binds the principal only when it is given to or acquired by him in the transaction in which the principal employs him.³ The reason for this limitation has been stated to be, that an agent cannot stand in the place of the principal until the relation is constituted; and that as to all the information which he has previously acquired, the principal is a mere stranger.⁴ Another explanation commonly made of the rule is that the agent may have forgotten the former transaction. Under this latter view of the doctrine, the criticism of Lord Eldon⁵ might well be

¹ *Boursot v. Savage*, L. R. 2 Eq. 134, 142.

² *Kennedy v. Green*, 3 Myl. & K. 699, 719. And see *Bradley v. Riches*, L. R. 9 Ch. D. 189.

³ *Warrick v. Warrick*, 3 Atk. 291, 294, per Lord Hardwicke; *Fitzgerald v. Fauncenberg*, Fitz G. 207; *Fuller v. Benett*, 2 Hare, 404; *New York Central Ins. Co. v. National Ins. Co.* 20 Barb. (N. Y.) 468; and see 2 *White & Tudor's Lead. Cas.* in Eq. 4th Am. ed. pt. 1, pp. 170, 173, and see *Rolland v. Hart*, L. R. 6 Ch. App. 678.

"It was said, in substance, by Lord Hardwicke, in *Warrick v. Warrick*, *supra*, that notice to the agent or counsel, who

was employed in the business by another person, or in another business, and at another time, is no notice to his client who employs him afterwards. It would be very mischievous if it was so; for the man of most practice and greatest eminence would then be the most dangerous to employ."

⁴ *Mountford v. Scott*, 3 Madd. 40; and see *Fuller v. Benett*, 2 Hare, 394, per Sir J. Wigram.

⁵ When the case of *Mountford v. Scott* was on appeal before Lord Eldon, L. C. (*Turn. & R.* 274), he remarked that "it might fall to be considered, whether one transaction might not follow so close upon the other as to render it impossible to give

regarded as shaking it; but it is suggested in later cases that it was not the purpose of his dictum to question the general doctrine itself. At any rate this has been insisted upon ever since his time, and may be regarded as settled.¹

When the agent or attorney is employed by a person in several mortgage transactions, and he acts for the mortgagees also in all of them, although the transactions are distinct, the later mortgagees are said to be affected with notice of the earlier mortgages; on the ground that the transactions follow each other so closely that they amount to a continuous dealing with the same title.² This exception would remain good only when the mortgagor was the same in all the transactions, and the same attorney is employed in all.

587. The notice must be of some matter material to the transaction; of some thing which it is the duty of the agent to make known to the principal.³ If the agent acts merely in a ministerial capacity, as, for instance, in obtaining the execution of a deed, the principal is not affected with the agent's knowledge.⁴ In like manner, a mortgagor to whom a mortgage is intrusted for record is not such an agent of the mortgagee that notice to him of an incumbrance, or his knowledge of it, is constructive notice to the mortgagee.⁵ As pointed out by Lord Westbury,⁶ a solicitor whose notice affects his client must be a solicitor "for the confidential purpose of advising," otherwise there is no duty on his part to communicate the knowledge to the client, and the doctrine of implied notice has no application.

Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment is notice to the plaintiff, and is equivalent to a record in protecting it against the attachment.⁷ But such knowledge on the part of an attorney who makes the writ, but has no agency in procuring the attachment, has been held not to affect the plaintiff.⁸

a man, credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening." And see *Hargreaves v. Rothwell*, 1 Keen, 154; *Brotherton v. Hatt*, 2 Vern. 574.

¹ *Fuller v. Benett*, *supra*.

² *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, 1 Keen, 154; *Winter*

v. Anson, 1 Sim. & St. 434; 8 C. 3 Russ. 488, 493; and see *Distilled Spirits*, 11 Wall. 356.

³ *Wyllie v. Pollen*, 32 L. J. (N. S.) Ch. 782.

⁴ *Wyllie v. Pollen*, *supra*.

⁵ *Anketel v. Converse*, 17 Ohio St. 11; *Hoppock v. Johnson*, 14 Wis. 303.

⁶ In *Wyllie v. Pollen*, *supra*.

⁷ *Tucker v. Tilton*, 55 N. H. 223.

⁸ *Tucker v. Tilton*, *supra*.

588. When the same agent or attorney is employed by both parties in the same transaction, his knowledge is then the knowledge of both the vendor and vendee, of both the mortgagor and mortgagee.¹ In such case, moreover, the rule that the agent's notice must be in the same transaction is less strictly adhered to.² Thus, where a person made two successive mortgages of the same property, and then gave a further charge to the first mortgagee, and the same solicitor was employed in all three transactions, it was held that the first mortgagee had implied notice of the second mortgagee's incumbrance, and that the latter was entitled to priority over the further charge to the first mortgagee.³

589. When the attorney himself is the borrower, the rule, that the knowledge of the attorney is the knowledge of the client, has no application. Therefore, where one was attorney for two persons, and executed to one of them a mortgage, which was not recorded, and afterwards executed another mortgage of the same premises to the other, and this mortgage was recorded, it was held that the priority of this mortgage was not affected by the attorney's knowledge of the mortgage first executed.⁴ Whenever the agent is "the contriver, the actor, and the gainer of the transaction," the reason for charging the principal with notice of the facts no longer exists.⁵

In like manner, when the agent is guilty of any fraud, for the carrying out of which it is necessary that he should conceal it from his principal, notice of it cannot be imputed to the latter.⁶ "It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client, in order to defraud him."⁷ The fraud must exist independently of the question whether the act was communicated to the principal or not.⁸

- Applying these principles the High Court of Justice of Eng-

¹ *Losey v. Simpson*, 11 N. J. Eq. (3 Stock.) 246. See *Astor v. Wells*, 4 Wheat. 466.

² *Fuller v. Bennett*, 2 Hare, 403; *Brotherton v. Hatt*, 2 Vern. 574.

³ *Hargreaves v. Rothwell*, 1 Keen, 154. See *Jamison v. Gjemenson*, 10 Wis. 411.

⁴ *Hope F. Ins. Co. v. Cambrelling*, 1 Hun (N. Y.), 493. And see *Rolland v. Hart*, L. R. 6 Ch. App. 678, 683, per Lord Hatherley; *Kennedy v. Green*, 3 Myl. & K. 699; *McCormick v. Wheeler*, 36 Ill.

114; *Winchester v. Balto. & Susquehanna R. R. Co.* 4 Md. 231.

⁵ *Kennedy v. Green*, 3 Myl. & K. 699.

⁶ *Kennedy v. Green*, *supra*; and see *In re European Bank*, L. R. 5 Ch. App. 358; *Fulton Bank v. N. Y. & Sharon Canal Co.* 4 Paige (N. Y.), 127.

⁷ *Rolland v. Hart*, L. R. 6 Ch. App. 678, 682.

⁸ *Atterbury v. Wallis*, 8 De G., M. & G. 454, 466; and see *Sharpe v. Foy*, L. R. 4 Ch. App. 35; *Hewitt v. Loosemore*, 9 Hare, 449, 455.

land in a recent case, where a trustee who was a solicitor used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor for the mortgagee in raising money on the estate, held, that the fraud of the solicitor ran through the whole transaction, and prevented the imputation of notice.¹

In other words, if the act done by the agent is such as cannot be said to be done by him in the character of agent, but is done by him in the character of a party to an independent fraud on his principal, it is not to be imputed to the principal as an act done by his agent.² Or, to state the matter somewhat differently, notice is imputed to the principal by reason of the agent's knowledge, unless there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated.³

590. Director of a corporation. — A corporation taking a mortgage of land is not chargeable with constructive notice of a prior conveyance of it by the mortgagor, because the latter was, at the date of the deed and of the mortgage, a director of the company, for in such a transaction the mortgagor deals with the company as a third party on his own behalf, acting for himself with and against the company, and not for it.⁴

4. *Constructive Notice.*

591. In general. — Constructive notice is that which is imputed to a person of matters which he necessarily either knows or ought to know, or which, by the exercise of ordinary diligence, he might know. It cannot be controverted.⁵ The most familiar

¹ *Cave v. Cave*, L. R. 15 Ch. D. 639.

² *Cave v. Cave*, *supra*, per Fry, J.; *Es-pin v. Pemberton*, 3 De G. & J. 547.

³ *Thompson v. Cartwright*, 33 Beav. 178.

⁴ *La Farge Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54, 61. "If his position as a director," says Mr. Justice Emott, "could make him the agent, or rather identify him entirely with the plaintiffs in such sort as to charge them with constructive notice of all the facts with which he was personally acquainted as to the title to lands in which they had any interest, in any case, it could not be so when he did not become concerned as their es-

pecial agent, or transact business in their behalf. Most clearly it cannot be the case where the facts concerned his private affairs, and the transaction was one in which he was dealing with the company as a third party on his own behalf, and acting for himself with and against them."

⁵ *Plumb v. Fluit*, 2 Anst. 432, 438, per Eyre, C. B.; and see *Kennedy v. Green*, 3 Myl. & K. 699, 719; *Hewitt v. Loosemore*, 9 Hare, 449; *Griffith v. Griffith*, Hoff. (N. Y.) 153; *Weilder v. Farmers' Bank of Lancaster*, 11 S. & R. (Pa.) 134.

As to the term *ordinary diligence*, see *Passumpsic Sav. Bank v. Nat. Bank of St. Johnsbury*, 53 Vt. 82, 90.

instance of constructive notice is that which under the registry laws is afforded by the record of a deed. Every subsequent inquirer is bound to know the existence and contents of such deed. But there are various other kinds of constructive notice, and a purchaser or mortgagee is as much bound by the knowledge thus imputed to him of matters and instruments affecting the title to property, as he would be if he were informed of them by a deed properly recorded. Whether the person charged with such notice actually had knowledge of the facts affecting the property in question, or might have learned them by inquiry, or whether he studiously abstained from inquiry for the very purpose of avoiding notice, he is alike presumed to have had notice.¹

592. Constructive notice is imputed either upon the ground of fraud or of negligence. It does not exist without one or the other. "If, in short, there is not actual notice that the property is in some way affected," says Vice-Chancellor Wigram,² "and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to a purchaser, there the doctrine of constructive notice will not apply; there the purchaser will in equity be considered, as in fact he is, a *bond fide* purchaser without notice." In another case Vice-Chancellor Turner said:³ "When this court is called upon to postpone a legal mortgage, its powers are invoked to take away a legal right, and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which in the eye of this court amounts to fraud."

593. Notice of the existence of the lien without the particulars of it is sufficient. One who has knowledge of a prior unrecorded mortgage upon some portion of the premises of which he is about to purchase a part is bound by such knowledge to ascertain the extent of that mortgage, and whether it covers the portion of the property he is about to acquire an interest in, and he will be postponed to such prior mortgage, even if this proves

¹ Whitbread v. Jordan, 1 Y. & C. Exch. 303, 328; Jones v. Smith, 1 Hare, 43, 55; Bisco v. Banbury, 1 Ch. Ca. 287, 291; Ware v. Egmont, 4 De G., M. & G. 460, 473; and see cases collected in 2

White & Tudor's Lead. Cas. 4th Am. ed. p. 121.

² Jones v. Smith, 1 Hare, 43, 55; affirmed on Appeal, 1 Ph. 244.

³ Hewitt v. Loosemore, 9 Hare, 449, 458.

to be an incumbrance upon the whole property.¹ Having notice of its existence he is chargeable with notice of all its contents.²

One having notice that an estate is incumbered is not justified in assuming that the incumbrance is one already known to him; he is bound to inquire into the nature and extent of the charge referred to.³ A notice of a lease is notice of all the covenants and provisions contained in it.⁴

594. Notice from recitals. — When a person claims under a deed which by its recitals leads him to other facts affecting the title to the property, he is presumed to know such facts; for it would be gross negligence in him not to make inquiry as to the facts he is thus put in the way of ascertaining.⁵ A recital or description in a deed, to have this effect, must be in the course of the title under which the purchaser claims.⁶ It must be sufficiently clear to put the purchaser upon inquiry, and to lead him to the requisite information. If the recital does not explain itself, it must refer to some deed or fact which will explain it, to make it constructive notice.⁷ Notice flowing from matters of record can never be more extensive than the facts stated or referred to.⁸

A description of a portion of the land described in a deed, as "land, the title to which is in A., given as collateral security to pay certain notes," is sufficient notice to the purchaser of an unrecorded mortgage to A. to preserve the priority of the mortgage.⁹ But a purchaser from one who has covenanted to pay all

¹ 2 White & Tudor's Lead. Cas. in Eq. 4th Am. ed. pt. 1, 190; Willink v. Morris Canal & Banking Co. 4 N. J. Eq. (3 Green) 377; and see Hall v. Smith, 14 Ves. 426; Guion v. Knapp, 6 Paige (N. Y.), 35.

² George v. Kent, 7 Allen (Mass.), 16; Pike v. Goodnow, 12 Ib. 472, 474; Barr v. Kinard, 3 Strobb. (S. C.) 73; Martin v. Cauble, 72 Ind. 67.

³ Jones v. Williams, 24 Beav. 47.

⁴ Taylor v. Stibbert, 2 Ves. Jun. 437.

⁵ Bacon v. Bacon, Tothill, 133; Moore v. Bennett, 2 Ch. Ca. 246; Aetna Life Ins. Co. v. Ford, 89 Ill. 252; S. C. 11 Chicago L. N. 47; United States Mortgage Co. v. Gross, 93 Ill. 483; Foster v. Strong, 5 Bradw. (Ill.) 223; Hassey v. Wilke, 55 Cal. 525; Parke v. Neeley, 90

Pa. St. 52; Reeves v. Vinacke, 1 McCrary, 213.

⁶ Boggs v. Varner, 6 W. & S. (Pa.) 469; Mueller v. Engeln, 12 Bush (Ky.), 441.

⁷ White v. Carpenter, 2 Paige (N. Y.), 217. In Sanborn v. Robinson, 54 N. H. 239, at the close of the description in a mortgage, the following words were inclosed in parenthesis:—

(Of six hundred dollars said premises are subject to a former

It was held that this was notice of a prior mortgage of that amount.

⁸ Gale v. Morris, 29 N. J. Eq. 222; Briggs v. Rice, 130 Mass. 50; Norman v. Towne, 130 Mass. 52.

⁹ Dunham v. Dey, 15 Johns. (N. Y.) 555.

legal mortgages and incumbrances of whatever nature and description on the premises is not put upon inquiry as to any incumbrance not of record, when there is a mortgage of record to which the covenant could properly refer. Neither could he be charged with constructive notice of a mortgage improperly recorded, as, for instance, one without a seal.¹

A note secured by a mortgage or deed of trust, and referring to such mortgage or deed by a statement that the note is secured by a mortgage or deed of trust, as the case may be, gives notice of the terms of the mortgage or deed of trust, so far as these terms in any way qualify the terms of the note, and the holder of the note is bound by such provisions of the mortgage; thus, he is bound by a provision in the mortgage that the non-payment of interest on the note shall have the effect of making the note due and payable at once.²

595. One who purchases land by a deed, which expressly recites that the premises are subject to a mortgage, has notice of the mortgage from the recital, and cannot claim against it, although it be not recorded.³ In like manner, and for stronger reasons, one who has purchased land subject to a mortgage, which he agrees to pay, takes a title subject to the mortgage, although it be not recorded, or be recorded in such a way that it is not notice.⁴

In Ohio, where the statute is such that a mortgage takes effect only from its delivery for record, and its priority is not affected by notice of a prior unrecorded mortgage, of course the mere mention of a prior mortgage in the deed, as, for instance, excepting it from the covenants of warranty,⁵ does not affect the priority given by the record; yet, if the mortgage be expressly made subject to another, priority of record will avail nothing.⁶ Moreover, one taking a mortgage made expressly subject to a prior mortgage cannot avoid it and acquire a larger lien than contracted for, although that mortgage be invalid as against the mortgagor.⁷ When a mortgage is expressly excepted from

¹ *Raconillat v. Rene*, 32 Cal. 450.

² *Noell v. Gaines*, 68 Mo. 649; S. C. 8 Cent. L. J. 353.

³ §§ 736, 744; *Reeves v. Vinacke*, 1 McCrary, 213; *Westervelt v. Wyckoff*, 32 N. J. Eq. 188; *Hull v. Sullivan*, 63 Ga. 126; *Garrett v. Puckett*, 15 Ind. 485; *George v. Kent*, 7 Allen (Mass.), 16; *Howard*

v. Chase, 104 Mass. 249; *Kitchell v. Mudgett*, 37 Mich. 81.

⁴ *Ross v. Worthington*, 11 Minn. 438.

⁵ *Bercaw v. Cockerill*, 20 Ohio St. 163.

⁶ *Coe v. Col.*, *Piqua & Ind. R. R. Co.* 10 Ohio St. 372, 406.

⁷ *Hardin v. Hyde*, 40 Barb. (N.Y.) 435; *Freeman v. Auld*, 44 N. Y. 50, reversing S. C. 44 Barb. 14; S. C. 37 Barb. 587.

a covenant of warranty in a deed this exception charges the purchaser with notice of the mortgage, although the mortgage be not recorded.¹

It is a general rule, as elsewhere shown, that when the mortgaged premises have been sold in parcels to different persons at different times, in the absence of any intervening equities, the several parcels are subject to the mortgage, and are to be resorted to in the inverse order of alienation.²

When, however, the first purchaser expressly takes subject to the mortgage, he has, of course, no equity as against the mortgagor that the portion still held by the latter shall be first applied to the payment of the incumbrance; and having no equity against him, he has none against his grantee. By taking such a deed he consents that the land shall remain subject to its *pro rata* share of the debt.³

A purchaser having actual notice of a mortgage is affected not only with the incumbrance of such mortgage, but with any other incumbrances which are referred to in that mortgage, or in other deeds to which the deeds first referred to may in turn refer.⁴ Having notice of the mortgage the purchaser is bound to know the contents of it, and that would lead him to other deeds, in which, pursued from one to another, the whole case would be discovered to him.⁵ Though the contents of a deed be stated to a purchaser, and he relies upon such statement, and the statement be erroneous, he is bound by its real contents;⁶ and in like manner, if he has knowledge of an unrecorded mortgage, and rests upon the vendor's assurance that the debt secured by it has been satisfied, he does so at his peril.⁷

596. Reasonable diligence.—A party wilfully closing his eyes against the lights to which his attention has been directed, and which, if followed, would lead to a knowledge of all the facts, is chargeable with notice of every fact that he could have

¹ *Morrison v. Morrison*, 38 Iowa, 73.

² *Iglehart v. Crane*, 42 Ill. 261; *McKinney v. Miller*, 19 Mich. 142. See § 1620.

³ *Briscoe v. Power*, 47 Ill. 447.

⁴ *Bisco v. Banbury*, 1 Ch. Ca. 287; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hope v. Liddell*, 21 Beav. 183; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271; *Green v. Slayter*, 4 Johns. (N. Y.) Ch. 38. See *Cambridge Valley Bank v. Delano*, 48

N. Y. 326; and see *Bent v. Coleman*, 89 Ill. 364; S. C. 7 Reporter, 366.

⁵ *Bisco v. Banbury*, *supra*, per Lord Chancellor.

⁶ *Jones v. Smith*, 1 Hare, 43; on appeal affirmed, 1 Ph. 244, and cases cited. But see *Drysdale v. Mace* 2 Sm. & G. 225; S. C. 5 De G., M. & G. 103.

⁷ *Price v. McDonald*, 1 Md. 403; *Hudson v. Warner*, 2 Harris & G. (Md.) 415.

obtained by the exercise of reasonable diligence. It is sufficient notice of an incumbrance to put a purchaser upon inquiry, that the mortgage, duly recorded, names a sum of \$500 in addition to the note secured.¹

In like manner, where a mortgage secured several notes, but in the record the description of one of them was omitted, but the aggregate amount of the notes was given correctly, it was held that the mortgage was notice to a purchaser for the full amount of the mortgage notes.² When a deed was made subject to "two mortgages for \$2,000," with warranty against all claims, "except said mortgages," — and there were two prior mortgages, one for \$1,500, which was recorded, and of which the purchaser had actual knowledge, and one of \$2,000, which was not recorded, and of which he had no notice except such as was given by the deed, it was held that the recitals in the deed were sufficient to put him upon inquiry and to charge him with actual knowledge of the unrecorded mortgage.³

A general description of the debt secured is sufficient to put all parties interested upon inquiry, and to charge them with notice of all facts that could be obtained by the exercise of ordinary diligence and the prosecution of the inquiry in the right direction.⁴

The limit of inquiry necessary in any case is that required by the use of reasonable diligence. What is reasonable diligence cannot be determined by any general rule, but must vary with the circumstances of each case. Thus where a mortgage was given to a retiring partner, to secure him against the liabilities of the partnership, and also for the "balance which should be due him on the purchase of such property," and notes were given for such purchase money, but no mention of them was made in the mortgage, it was held that a second mortgagee who had taken his mortgage after inquiring of both the mortgagor and the mortgagee whether anything was due for purchase money, and received the answer from both that it was all paid, was entitled to priority over the prior mortgagee, and even as against the assignee of one of the notes given for purchase money.⁵

¹ *Passumpsic Sav. Bank v. Nat. Bank of St. Johnsbury*, 53 Vt. 82; *Babcock v. Lisk*, 57 Ill. 327; *Heaton v. Prather*, 84 Ill. 330. See *Vredenburg v. Burnet*, 31 N. J. Eq. 229.

² *Dargin v. Becker*, 10 Iowa, 571.

³ *Hamilton v. Nutt*, 34 Conn. 501.

⁴ *Seymour v. Darrow*, 31 Vt. 133; *Passumpsic Sav. Bank v. Nat. Bank of St. Johnsbury*, 53 Vt. 82.

⁵ *Passumpsic Sav. Bank v. Nat. Bank of St. Johnsbury*, *supra*. Veazey, J., de-

The record of a foreclosure suit may affect one who derives title under the foreclosure sale with knowledge of another unsatisfied mortgage upon the premises, and of the equity of the holder of that mortgage as against the purchaser at that sale.¹

597. A conveyance of land to the mortgagee subject to a mortgage may or may not imply that he has assigned the mortgage. It has already been noticed that a deed conveying land subject to a certain mortgage, or warranting it against all incumbrances except the mortgage, is notice to all persons claiming under such deed of the existence of the mortgage. If such a deed of the equity of redemption be made to the mortgagee himself, it is a question of fact for a jury whether such recital or warranty implies that the mortgage is not then held by the mortgagee, or is notice to his attaching creditors that the mortgage has been assigned to another.²

The record of a purchase money mortgage is not notice of the conveyance for which such mortgage was given, so as to invalidate the title of one who subsequently purchases of the vendor before the first deed given by him is recorded.³

598. One who merely takes a release of all the interest of the mortgagor, while an unrecorded mortgage made by him is outstanding, obtains only the mortgagor's equity of redemption subject to such mortgage.⁴

5. *Lis Pendens.*

599. The force and effect of the recording of a mortgage are limited not only by the actual notice which the mortgagee may

live in the opinion of the court, said: "Where the form or specification of the obligation intended to be secured is described or referred to, or where the description indicates that the debt is specified in some written form, or is of such a character that it is practicable to be pursued by inquiry beyond the parties to the mortgage, and the facts as to its payment determined, the authorities indicate that a purchaser or subsequent incumbrancer proceeds at his peril. The parties to the mortgage have furnished him the means of finding out the facts; therefore he must find them out. But such is not this case. Here the parties gave no clue to any discovery attainable beyond them-

selves. Under such circumstances, it seems to us that inquiry of those parties is the use of that degree of diligence which the law requires; and that, in view of the facts alluded to, the defendant's mortgage should prevail."

¹ *Locker v. Riley*, 30 N. J. Eq. 104.

² *Clark v. Jenkins*, 5 Pick. (Mass.) 280.

³ *Pierce v. Taylor*, 23 Me. 246; *Losey v. Simpson*, 11 N. J. Eq. (3 Stock.) 246; but it is notice of such deed to one claiming under the mortgagee. *Center v. Planters' & Merchants' Bank*, 22 Ala. 743.

⁴ *Smith v. Br. Bank at Mobile*, 21 Ala. 125.

have of prior unrecorded conveyances, but also by constructive notice of rights and claims of other parties, furnished by the pendency of an action in relation to the title of the mortgaged property, notice of the pendency of which has been filed according to law; as, for instance, the pendency of a suit to set aside the conveyance to the mortgagor as fraudulent.¹ The doctrine of *lis pendens* is founded upon the consideration that no suit could be successfully terminated if, during its pendency, the property could be transferred so that it would not be bound by the decree or judgment in the hands of the assignee.

This doctrine of *lis pendens*, however, is not carried to the extent of making it constructive notice of a prior unregistered deed;² as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of the mortgaged property.

6. How far Possession is Notice.

600. Possession by one who is not the owner of record is a fact which should induce one proposing to purchase to inquire whether the possession is founded on any title. It is notice of the rights of the occupant, whatever they may be; and if he claim by deed, his possession is regarded by some authorities as equivalent to the recording of such deed.³ If the mortgage be

¹ Tyler v. Thomas, 25 Beav. 47; Worsley v. Scarborough, 3 Atk. 392; Bellamy v. Sabine, 1 De G. & J. 566, 580; Ayrault v. Murphy, 54 N. Y. 203; Murray v. Ballou, 1 Johns. (N. Y.) Ch. 566; and see Mitchell v. Smith, 53 N. Y. 413; Young v. Guy, 23 Hun (N. Y.), 1; Lawrence v. Conklin, 17 Hun (N. Y.), 228; Center v. Planters' & Merchants' Bank, 22 Ala. 743; Allen v. Poole, 54 Miss. 323; and see, also, cases collected in 2 White & Tudor's Lead. Cas. in Eq. 4th Am. ed. pt. 1, p. 192 et seq. See § 1411.

² 1 Story's Eq. Jur. § 406; Douglass v. McCrackin, 52 Ga. 596; Newman v. Chapman, 2 Rand. (Va.) 93. In Alabama, on the contrary, such suit is notice from the time when service is perfected. Hoole v. Atty. Gen. 22 Ala. 190.

³ James v. Lichfield, L. R. 9 Eq. 51; Taylor v. Stibbert, 2 Ves. Jun. 437; Moreland v. Richardson, 24 Beav. 33; Wilson v. Hart, L. R. 1 Ch. App. 463

467; Truesdale v. Ford, 37 Ill. 210, 213; Brown v. Gaffney, 28 Ill. 149, 157; Doyle v. Stevens, 4 Mich. 87; Farmers' Loan & Trust Co. v. Maltby, 8 Paige (N. Y.), 361; Emmons v. Murray, 16 N. H. 385; Mullins v. Wimberly, 50 Tex. 457; S. C. 7 Reporter, 280; 2 White & Tudor's Lead. Cas. in Eq. 4th Am. ed. pt. 1, p. 180; Stagg v. Small, 4 Bradw. (Ill.) 192; Westbrook v. Gleason, 79 N. Y. 23; Taylor v. Mosely, 57 Miss. 544; Morrison v. March, 4 Minn. 422; Groff v. Ramsey, 19 Minn. 44; Cowen v. Loomis, 91 Ill. 132.

In Massachusetts, since the Rev. Stat. of 1836, constructive notice of a prior unrecorded deed is not admissible; the notice, to be effectual, must be actual. Lamb v. Pierce, 113 Mass. 72. Therefore open possession by one who has an unrecorded deed of land will not avail as notice of such deed, for it is not evidence of "actual notice." Dooley v. Wolcott, 4 Allen, 406; Pomroy v. Ste-

by an absolute deed, the defeasance of which is not recorded, the mortgagor's continued possession and occupation of the premises, within the knowledge of grantees of the mortgagee, is held by some courts to be sufficient notice of the mortgagor's title;¹ but by others his possession is not regarded as notice of the defeasance,² for the principle that possession is notice of the possessor's title is intended to protect only equitable rights, and not to cover the possessor's fraud or to protect him when he has no equity.³ In like manner it has been held that where land is conveyed, and at the same time mortgaged back for the security of the purchase money, and the grantor becoming the mortgagee continues in actual possession and occupation of the land, but neither the deed nor the mortgage is recorded, and the mortgagor in the mean time makes another mortgage of it to a third person, the mortgage for the purchase money is entitled to priority.⁴

Possession of a part of the premises described in a mortgage may be notice to the mortgagee of the condition of the title of the entire tract, if the mortgagee has actual notice of the possession; for having such notice he is bound to follow up the inquiry, and if that would necessarily lead to the knowledge of the possession of the other part by another person under the same title he is affected with notice of the possession of such other part.⁵ But if his notice of the possession of a part be constructive only, its effect cannot be extended to lands outside the limits of the possession.⁶

An actual possession of the premises, to operate as implied notice, must be visible and open, notorious and exclusive, and not merely a constructive possession.⁷

vens, 11 Met. 244. Proof of such fact may, however, be made in connection with evidence of actual notice. *Sibley v. Leffingwell*, 8 Allen, 584; *Mara v. Pierce*, 9 Gray, 306. Nor is the fact that land is assessed to one who holds an unrecorded deed actual notice of it. *Parker v. Osgood*, 3 Allen, 487, 490.

In some cases it is said that possession is not notice of the equities of the occupant, but only evidence tending to prove his equity. Notice is the ultimate fact to be proven, and possession is evidence upon that issue. *Pico v. Gallardo*, 52 Cal. 206; *Fair v. Stevenot*, 29 Cal. 486.

¹ *Daubenspeck v. Platt*, 22 Cal. 330; *New v. Wheaton*, 24 Minn. 406; *Pell v. McElroy*, 36 Cal. 268.

² *Crassen v. Swoveland*, 22 Ind. 427; *Newhall v. Pierce*, 5 Pick. (Mass.) 450; *Groton Savings Bank v. Batty*, 30 N. J. Eq. 126; S. C. 7 Reporter, 505; *Brophy Mining Co. v. Brophy & Dale Gold and Silver Mining Co.* 15 Nev. 101.

³ *Groton Savings Bank v. Batty*, *supra*.

⁴ *M'Kecknie v. Hoskins*, 23 Me. 230. And see *Parsell v. Thayer*, 39 Mich. 467.

⁵ *Watkins v. Edwards*, 23 Tex. 443.

⁶ *Daggs v. Ewell*, 3 Woods, 344.

⁷ *Noyes v. Hall*, 97 U. S. 34; *Gum v. Equitable Trust Co.* 1 McCrary, 51; *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 211; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213, 226; *Brophy Mining Co. v. Brophy & Dale Gold and Silver Mining Co.* 15 Nev. 101; *Trezise v. Lacy*, 22 Kans. 742.

The continued possession of the mortgagor after the premises have been sold under a foreclosure against him is not deemed constructive notice of any subsequent title or interest he may have acquired which does not appear of record.¹ Due diligence on the part of the mortgagee, in obtaining information after having been put upon inquiry, is a test of good faith.²

But it is held that possession, to operate as notice, should be inconsistent with the title upon which the possessor relies. The owner and occupant of a house conveyed it in fee to a son; and taking back a lease for life, remained in possession. The son, before the lease was recorded, gave a mortgage on the property to one who made reasonable inquiries as to liens.³ It was held that the possession of the former owner under the lease was not such as to give the mortgagee notice of any rights in the premises.

As against an innocent mortgagee; notice from the possession of land cannot be set up by an occupant, who, for the purpose of concealing his interest from creditors, placed the title in the name of another, and after the latter had given a mortgage upon the land kept silent and permitted the mortgagor to borrow more money of the mortgagee on a second mortgage; when if such occupant had notified the mortgagee of his claim upon his first being made aware of the existence of the earlier mortgage, the mortgagee might have collected the mortgage debt and would not have made the second loan upon the security of the land.⁴

Possession by a vendee under a contract of purchase, whether it be personal or by a tenant, is constructive notice of his equitable rights as purchaser, and any one taking a mortgage under such circumstances from his vendor takes subject to his rights.⁵ The mortgage lien in such case covers the property only to the extent of the unpaid purchase money.⁶

601. An equivocal, occasional, or temporary possession will not take the case out of the operation of the registry laws. The protection furnished by these laws should not be taken away except upon clear proof of a want of good faith in the party

¹ Dawson v. Danbury Bank, 15 Mich. 489; and see Cook v. Travis, 20 N. Y. 400.

² Reed v. Gannon, 50 N. Y. 345, 350.
³ Staples v. Fenton, 5 Hun (N. Y.), 172. A like discussion on similar facts was made in Bell v. Twilight, 18 N. H. 159; but the same reasons were not assigned.

⁴ Groton Savings Bank v. Batty, 30 N. J. Eq. 126.

⁵ Bank of Orleans v. Flagg, 3 Barb. (N. Y.) Ch. 316; Braman v. Wilkinson, 3 Barb. (N. Y.) 151.

⁶ Westbrook v. Gleason, 14 Hun (N. Y.), 245; Young v. Guy, 12 Hun (N. Y.), 325; S. C. 5 Weekly Dig. 399; 23 Hun, 1.

claiming their protection, and a clear right in him who seeks to establish notice by means of possession.¹ The circumstances must be such that a prudent man would be put upon inquiry, and would be chargeable with bad faith if he did not inquire. "We would observe," said Chief Justice Parsons, in an early case in Massachusetts,² "that the statute requiring the registry of conveyances being so very beneficial, and it being so easy to conform to it, when a prior conveyance not recorded until after one of a subsequent date is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved." The using of lands for pasturing, or for cutting timber is not such an occupancy as will charge a purchaser with notice. The possession must be accompanied by improvement of the property to constitute notice.³

One purchasing or taking a mortgage of premises in the possession of a tenant is bound to inquire into the nature and extent of the tenant's interest, and is affected with notice of that interest whatever it may be.⁴ Such possession is also held to be notice of a collateral agreement held by the tenant for the purchase of the property.⁵

A husband and wife, who had long occupied a farm, conveyed it to their son, and took back a mortgage conditioned for their support, but omitted to record it. They continued upon the farm; they and the son constituting one family, and all contributing to its support. Some years afterwards the son made a second mortgage, which was duly recorded; but the second mortgagee was regarded as having had notice of the legal title of the first mortgagees.⁶

A joint residence of husband and wife does not give notice of any claim of interest in the land by the wife.⁷

If the owner of land conveys only a partial interest in it, as,

¹ *Brown v. Volkening*, N. Y. Ct. of Appeals, 2 N. Y. W. Dig. 86; *Trustees of Union College v. Wheeler*, 59 Barb. (N. Y.) 585; *Bogue v. Williams*, 48 Ill. 371; *Butler v. Stevens*, 26 Me. 484; 2 *White & Tudor's Lead. Cas. in Eq.* 4th Am. ed. pt. 1, p. 185, and cases cited; *Merritt v. Northern R. R. Co.* 12 Barb. (N. Y.) 605.

² *Norcross v. Widgery*, 2 Mass. 506.

³ *M'Mechan v. Griffing*, 3 Pick. (Mass.) 149, and cases cited; *Holmes v. Stout*, 10

N. J. Eq. (2 Stockt.) 419; *Trustees of Union College v. Wheeler*, 59 Barb. (N. Y.) 585, and cases cited.

⁴ *Cunningham v. Pattee*, 99 Mass. 248, 252.

⁵ *Knight v. Bowyer*, 23 Beav. 609, 641; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Kerr v. Day*, 14 Pa. St. 112.

⁶ *Boggs v. Anderson*, 50 Me. 161. See *Harrison v. N. J. R. & Transportation Co.* 19 N. J. Eq. 498.

⁷ *Neal v. Perkerson*, 61 Ga. 345.

for instance, the wood and timber growing upon it, and takes back a mortgage which is not recorded, his continued possession is not notice of his claim to the wood and timber, as against one who has purchased upon the faith of his bill of sale.¹

Actual possession of land, by one who holds an unrecorded bond for a deed, is notice of his rights to one who takes a mortgage on the land from the vendor, and the mortgagee will take a lien only on the vendor's right.² But the possession of a mortgagee, whose mortgage is recorded, is not notice of his claim under an agreement to purchase the premises, although a rumor of his purchase was current in the neighborhood;³ for in such case his possession is consistent with his record title, and it may well be taken for granted that he holds under the recorded title. Possession is notice only of the legal or equitable interest in the land of the person in possession. It vests the purchaser with notice of every fact and circumstance which he might have learned by making inquiry of the occupant, but it does not impose upon him the duty of searching the record in the name of such occupant to ascertain what title he has parted with.⁴

7. *Fraud as affecting Priority.*

602. Another instance of constructive fraud arises when a person having a mortgage upon an estate conceals its existence, or so acts in relation to it as to induce another to purchase the estate, or to loan additional money upon it, in the belief that it is free from incumbrance. What circumstances will amount to a fraudulent concealment or misrepresentation may depend in some measure upon the inquiry whether the prior mortgage is recorded or not; and, moreover, different considerations will control in cases of this sort, where a registry system is in full operation, as it is in this country, from those that prevail in England, where the possession of the title deeds for the most part stands in place of registration. But whatever the circumstances may be, "the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from

¹ Patten v. Moore, 32 N. H. 382.

² Doolittle v. Cook, 75 Ill. 354.

³ Plumer v. Robertson, 6 Serg. & R. (Pa.) 179.

⁴ Losey v. Simpson, 11 N. J. Eq. (3 Stock.) 246.

averring against the latter a different state of things as existing at the same time.”¹

603. A mortgagee allowing or inducing another to purchase the property as unincumbered, without disclosing his mortgage, may be precluded from setting it up against such purchaser; such, for instance, is the case of an attorney who acts for the mortgagor in drawing a deed for the conveyance of land from the mortgagor to a purchaser, but does not disclose a mortgage he himself holds upon the property, though he knows that the purchaser is buying it for its full value in ignorance of the mortgage.²

A mortgagee, however, whose mortgage is recorded, will not be so postponed merely because he knew that the mortgagor was making a subsequent conveyance of the premises, and did not make known his title; to have this effect, there must be actual and intentional fraud on his part;³ or he must have done some act, or made some representation, to influence the conduct of another by inducing a belief of a given state of facts, when such party, having acted upon such belief, would be injured by showing a different state of facts. An *estoppel in pais* then arises against him. But he loses no right by neglecting to give a personal notice of his mortgage to one who is purchasing. The purchaser is presumed to know of the mortgage which has been duly recorded. He is bound at his peril to investigate the title.⁴

So, also, if a first mortgagee, having notice of a second mortgage, does anything to the prejudice of the latter; as, for instance, if he releases any part of the mortgaged premises without receiving payment of any part of his mortgage debt, he is, to the extent of injury done, postponed to the second mortgage.⁵

If a mortgagee represents to another person that the debt secured by the mortgage has been paid or satisfied, and that nothing is due on it, and thereby induces him to release other security and take a mortgage of the same land, the last mortgage, as between the two mortgagees, will take priority of the first, al-

¹ Per Lord Denman, C. J., in *Pickard v. Sears*, 6 Ad. & El. 469, 471; and see *Peter v. Russell*, 1 Eq. Ca. Abr. 322; *Savage v. Foster*, 9 Mod. 35; *Sharpe v. Foy*, L. R. 4 Ch. App. 35; *Berriaford v. Milward*, 2 Atk. 49.

² *L'Amoureux v. Vandenburg*, 7 Paige (N. Y.), 316; and see *Lee v. Munroe*, 7 Cranch, 366, 368.

³ *Paine v. French*, 4 Ohio, 318; *Brinckerhoff v. Lansing*, 4 Johns. (N. Y.) Ch. 65; *Palmer v. Palmer*, 48 Vt. 69; and see *Marston v. Brackett*, 9 N. H. 336; and see *Story Eq. Juris.* § 391.

⁴ *Rice v. Dewey*, 54 Barb. (N. Y.) 455.

⁵ *Bailey v. Gould*, Walk. (Mich.) 478.

though the first was on record when such representation was made, as the person making the representation is estopped from disputing the truth of it with respect to the other, who was thereby induced to alter his condition.¹ And so if the first mortgagee in any way combines with the mortgagor to induce another to loan money upon the estate, in ignorance of the first mortgage, this fraud will, without doubt, postpone his own mortgage.² And so if a second mortgagee stands by and sees the mortgagor induce the first mortgagee to release his mortgage, and take an assignment of another mortgage which he supposes to be next in priority to his own, but which is in fact subsequent to the second mortgage, as against the second mortgagee, this subsequent mortgage will be preferred to his own.³ When the holder of one of two mortgage deeds, executed on the same day, has represented to a person about to take an assignment of the other mortgage that the deeds were delivered at the same time, and that there was no priority in his deed, he is precluded from claiming a priority against such person.⁴

8. *Negligence as affecting Priority.*

604. Negligence is not fraud, though it may be evidence of it.⁵ When a person having a mortgage upon an estate, or other interest in it, negligently puts it in the power of another to sell or mortgage the property to a third person, who is ignorant of such mortgage or interest, he cannot afterwards assert his own title in priority to the title of the party whom he has suffered to be deceived.⁶ By negligence is meant the want of that reasonable degree of diligence and care which a man of ordinary prudence and capacity would be expected to exercise in the same circumstances.

¹ *Platt v. Squire*, 12 Met. (Mass.) 494; *Fay v. Valentine*, 12 Pick. (Mass.) 40; *Heane v. Rogers*, 9 Barn. & Cres. 577, 586; *Miller v. Bingham*, 29 Vt. 82; *Chester v. Greer*, 5 Hump. (Tenn.) 26.

² *Peter v. Russell*, 1 Eq. Ca. Abr. 322.

³ *Stafford v. Ballou*, 17 Vt. 329.

⁴ *Broome v. Beers*, 6 Conn. 198.

⁵ *Jones v. Smith*, 1 Hare, 43; *Worthington v. Morgan*, 16 Sim. 547.

⁶ *Briggs v. Jones*, L. R. 10 Eq. 92, 98; *Robinson's Law of Priority*, 54; *Rice v. Rice*, 2 Drew. 73; 1 *Fisher on Mort.* 3d ed. 550. In *Briggs v. Jones*, *supra*, Lord

Romilly thus stated the principle of this rule: "A person who puts it in the power of another to deceive and raise money must take the consequences. He cannot afterwards rely on a particular or a different equity." Most of the English cases upon this point relate to the matter of the delivery of title deeds; and therefore are for the most part of use in this country only as illustrating the general principles of the law of notice. See *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; *Layard v. Maud*, L. R. 4 Eq. 397.

A person taking a mortgage or other conveyance of real estate is chargeable with notice of such facts as are indicated upon the face of the deeds, whether they indicate anything to him or not; for if he does not use the precaution, which common prudence requires, to employ a solicitor, he is in the same situation, with respect to constructive notice, as he would have been had he employed a solicitor.¹

605. It sometimes happens that a mortgagee may lose his position of priority, and, without intending to impair his own security, find himself in the place of a subsequent mortgagee, through want of care in dealing with the mortgaged property. Thus, if a mortgagee knowingly and understandingly cancel his mortgage when there is a second mortgage upon the property, and in lieu of the mortgage takes an absolute conveyance of the property, in the absence of any fraud on the part of the holder of the second mortgage, the lien of the first mortgage will not be revived nor the second mortgagee prevented from reaping the benefit of the priority of his mortgage, upon the records.² In like manner, where a senior mortgage is released without being paid, and at the same time a new mortgage is taken for the same sum, the question is whether a junior mortgage is thereby let into the position of priority. Although the transaction be a simultaneous one, and is not intended to impair the lien of the first mortgage, it is held that the release, if it be absolute in terms, will discharge the lien, and the new mortgage will be only a subordinate lien.³

But when a creditor to whom land has been conveyed in trust, to secure a debt, by a deed absolute in form reconveys it to his grantor, and simultaneously takes back a mortgage to secure the same debt, he does not lose his lien in equity as against a judgment rendered against the debtor subsequent to the original conveyance.⁴

606. Priority of lien between the holders of several notes secured by a mortgage, is, by some authorities, determined ac-

¹ *Kennedy v. Green*, 3 Myl. & K. 699. The Master of the Rolls, referring to this case in *Greensdale v. Dare*, 20 Beav. 284, 291, said that the doctrine of this case requires to be administered with the greatest care and delicacy, and that probably that each case must stand upon the peculiar facts belonging to it.

² *Frazee v. Inslee*, 2 N. J. Eq. (1 Green) 239. The Chancellor said, that to revive

the mortgage in such case would be giving encouragement to negligence, and would destroy the value of a public record. And see *Smith v. Brackett*, 36 Barb. (N. Y.) 571; *Banta v. Garmo*, 1 Sandf. (N. Y.) Ch. 383. See §§ 966-971.

³ *Woollen v. Hillen*, 9 Gill (Md.), 185. To the same effect, see *Neidig v. Whiteford*, 29 Md. 178.

⁴ *Christie v. Hale*, 46 Ill. 117.

cording to the order of their maturity.¹ If judgment is obtained on one of the notes, that takes the place of the note on which it was rendered.² The holder of the note first maturing may, upon default, or at any time afterwards, foreclose and sell the premises in satisfaction of his debt.³ His delay to enforce his rights does not impair his prior right.⁴ But the mortgagee may by agreement give to particular notes a prior lien upon the security, irrespective of the time of their maturity; and therefore one who takes an assignment of a part of the notes secured by a mortgage should inquire of the maker and of the payee whether the others have been sold with a preferred lien upon the security. It is negligence on his part not to make such inquiry; and if the preferred lien has been given, it will be valid against such assignee.⁵ One holding a mortgage securing several promissory notes may assign part of the notes, and a corresponding interest in the mortgage, giving priority to the assignee, or a *pro rata* interest in the security, according to the terms of the assignment.⁶

A mortgage executed by one partner in the partnership name of real estate belonging to the firm, to secure a partnership debt, conveys the legal interest of such partner and the equitable interest of the copartner; as when A. executed a mortgage in the firm name of A. & Bro., and himself acknowledged it. But a person taking a subsequent mortgage, properly executed by both partners, has priority as to the interest of the partner who did not execute the first mortgage.⁷ A mortgage by one tenant in common of his interest in partnership real estate, made for a valid consideration to one who has no notice of the partnership, is not subject to any equities arising out of the partnership relation of the grantor.⁸

Of two mortgages executed at the same time, to secure debts which mature at different times, if there be no other ground of priority, according to some authorities that is the prior lien which secures the payment of the note which first falls due. The rule is the same as it is when one mortgage secures debts maturing at different times; they are to be paid in the order of their matu-

¹ See §§ 1699-1702, 1939.

² Funk v. McReynold, 33 Ill. 481.

³ Marine Bank v. International Bank, 9 Wis. 57; Wood v. Trask, 7 Wis. 566; Lyman v. Smith, 21 Wis. 674.

⁴ Lyman v. Smith, *supra*.

⁵ Walker v. Dement, 42 Ill. 272.

⁶ Lane v. Davis, 14 Allen (Mass.), 225; Howard v. Schmidt, 29 La. Ann. 129.

⁷ Chavener v. Wood, 2 Oregon, 182; Haynes v. Seachrest, 13 Iowa, 455. And see Brazleton v. Brazleton, 16 Iowa, 417.

⁸ See §§ 119, 120; McDermot v. Laurence, 7 S. & R. (Pa.) 438.

ity.¹ It makes no difference in the order of payment, that after the assignment of the note first maturing to one person, the note next maturing is assigned to another with the mortgage or trust deed. The holding of the mortgage security gives no preference in order of payment.²

607. As between several unrecorded mortgages or other conveyances that of prior execution takes precedence.³ And so where several mortgages are executed and recorded at the same time, whether the parties intended that one of them should have priority is a matter of fact for the jury to determine from the evidence of such intention.⁴

608. Agreement fixing the priority of mortgages. — The parties may, as between themselves, make a valid agreement, though it be verbal only, that one of two mortgages shall be prior to the other, and the order of record is then immaterial unless they are subsequently assigned to other persons who have no notice of the agreement; ⁵ although, according to some authorities, the want of notice on the part of the assignee makes no difference, but the mortgage continues subject to the equity of this arrangement.⁶ But such an agreement itself when in writing is not entitled to record, and therefore, if recorded, is not notice to subsequent purchasers; ⁷ and in that case the record of it would not be constructive notice to an assignee of the deferred mortgage. But if such assignee had knowledge of the agreement, he would take subject to the equities thereby conferred.⁸

A mortgagee has an unquestionable right to waive his priority in favor of a subsequent mortgagee.⁹ If a prior mortgagee re-

¹ *Isett v. Lucas*, 17 Iowa, 503; *Bank of U. S. v. Covert*, 13 Ohio, 240; *Murdock v. Ford*, 17 Ind. 52; *Harris v. Harlan*, 14 Ind. 439; *Marine Bank v. International Bank*, 9 Wis. 57. According to other authorities this circumstance is no evidence to determine the fact of priority. *Gilman v. Moody*, 43 N. H. 239.

² *Gwathmays v. Ragland*, Rand. (Va.) 466.

³ *Ely v. Scofield*, 35 Barb. (N. Y.) 330; *Berry v. Mut. Ins. Co.* 2 Johns. (N. Y.) Ch. 603.

⁴ *Gilman v. Moody*, 43 N. H. 239.

⁵ *Jones v. Phelps*, 2 Barb. (N. Y.) Ch. 440; *Rhoades v. Canfield*, 8 Paige (N. Y.), 545; *New York Chemical Manuf. Co. v. Peck*, 6 N. J. Eq. (2 Halst.) 37; *Decker*

v. Boice, 19 Hun (N. Y.), 152; *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618; S. C. 29 How. Pr. 263; *Beasley v. Henry*, 6 Bradw. (Ill.) 485; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469; *Bank of S. C. v. Campbell*, 2 Rich. (S. C.) Eq. 179; *Rigler v. Light*, 90 Pa. St. 235; *Poland v. Lamoille Valley R. R. Co.* 52 Vt. 144.

⁶ *Conover v. Van Mater*, 18 N. J. 481; *Freeman v. Schroeder*, *supra*; *Cable v. Ellis*, 86 Ill. 525.

⁷ *Gillig v. Maass*, 28 N. Y. 191.

⁸ *Bank of Savings in N. Y. v. Frank*, 45 N. Y. Superior Ct. 404.

⁹ *Clason v. Shepherd*, 6 Wis. 369; *Taylor v. Wing*, 23 Hun (N. Y.), 233; *Trost v. Yonkers Sav. Bk.* 70 N. Y. 553; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq.

lease his mortgage in order to enable the mortgagor to raise money upon the same property with which to make improvements thereon, such mortgagee cannot afterwards be heard to object that the money was raised by the second mortgagee upon discount of other paper of the mortgagor, or that the mortgagor failed to expend the money as he had agreed.¹

A mere admission by one of two mortgagees, whose mortgages were executed, delivered, and recorded on the same day, that there is no priority of one mortgage over the other, although made by a writing signed by him, does not preclude his afterwards claiming a priority in time for his own mortgage, because such admission is like a parol declaration, subject to be explained or contradicted.² But such writing would be admissible in evidence to show that the deeds took effect simultaneously.³

Without any agreement, there may be facts and circumstances which will entitle one or two mortgages recorded at the same time to an equitable priority over the other;⁴ and on the other hand, although one mortgage may have been recorded before another, there may be facts which will entitle the two mortgages to stand upon an equality. An instance of the latter kind occurs when a trustee, having two funds, loans them to the same person, upon two distinct mortgages, without the intention of giving one priority to the other.⁵ Moreover, the mortgage first recorded, and therefore *prima facie* the prior lien, may be shown to have been conditionally recorded; and a second mortgage, recorded before the condition was complied with, may be entitled to precedence.⁶

It is no ground for giving priority to a junior mortgage, that the money received upon it was used in conserving the mortgaged property, or in improving it in any way. Although a portion of a line of railway subject to a mortgage be wholly constructed by money raised on a second mortgage, yet this fact gives the latter no priority over the former. The prior mortgage, although given before the road is built, attaches as fast as it is built, and to all property covered by the terms of the mortgage, as fast as it comes into existence.⁷

328; *Poland v. Lamoille Valley R. R. Co.* 52 Vt. 144.

¹ *Darst v. Bates*, 95 Ill. 493.

² *Beers v. Broome*, 4 Conn. 247.

³ *Beers v. Hawley*, 2 Conn. 467.

⁴ *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316.

⁵ *Rhoades v. Canfield*, 8 Paige (N. Y.), 545.

⁶ *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618.

⁷ *Galveston R. R. v. Cowdrey*, 11 Wall. 459. "Had the first mortgage," says Mr. Justice Bradley, "been given before a

609. A mortgage executed before the commencement of a building erected on the land is paramount to a mechanic's lien for work and materials furnished for the building.¹ If a mortgagee, while in possession, erects a house on the premises, a mechanic's lien for this work is subject to the mortgage.² A mortgage for the purchase money has priority over a mechanic's lien which attached to a building on the property while it was under contract for sale to the mortgagor, and before the deed and mortgage were executed.³

shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow in small parcels as sections of the

road were completed, and trust deeds could be safely given thereon. The practice of the country and its necessities are coincident with the rule." See, also, *Willink v. Morris Canal & Banking Co.* 3 Green (N. J.) Ch. 377, 402.

¹ § 479 a; *Hershee v. Hershey*, 15 Iowa, 185; *Jessup v. Stone*, 13 Wis. 466; *Jean v. Wilson*, 38 Md. 288; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585; *Hoover v. Wheeler*, 23 Miss. 314.

² *Ferguson v. Miller*, 6 Cal. 402.

³ See § 466; *Rees v. Ludington*, 13 Wis. 276.

CHAPTER XIV.

VOID AND USURIOUS MORTGAGES.

PART I.

Void Mortgages.

- I. Want or failure of consideration, 610-616.
- II. Illegal consideration, 617-622.
- III. Mortgages executed on Sunday, 623.
- IV. Fraudulent mortgages, 624-632.

PART II.

Usury.

- I. What mortgages are usurious, 633-649.
- II. Compound interest, 650-655.
- III. Conflict of laws, 656-663.

Introductory. — In this chapter it is proposed to treat briefly of some of the circumstances under which a mortgage duly executed and recorded may be declared defective or void. These circumstances are inherent in the transaction itself, and in some form vitiate the consideration of the mortgage. For the most part, they are the same vices which invalidate any contract. Want or failure of consideration, and fraud or usury in it, are not matters peculiar to mortgages; and it is, of course, impossible to treat at length of these matters, which are themselves the subjects of general treatises under the titles of Contracts, Frauds, and Usury. Only adjudications relating especially to mortgages are presented; and these not fully on those points which are common to all contracts. The subject, however, opens one inquiry not presented in other contracts, and that is, whether the law of the place where the mortgaged land is situated, when the contract has been executed in another state or country, should govern as to the law of usury applicable to it; or should govern, too, as to other statutes which may invalidate the contract; and, therefore, this part of the subject has been examined more fully than its importance would seem to justify, except upon the principle that the importance of questions treated of should be determined by the relative difficulty or uncertainty attending them.

PART I.

VOID MORTGAGES.

1. *Want or Failure of Consideration.*

610. *Consideration.* — In general the same defences may be made to an action on a mortgage, the statute of limitations excepted, that may be made to an action on the debt, — as that it was given for an illegal consideration, or was obtained by duress and fraud.¹ A mortgage, like every other contract, must be founded on a sufficient consideration. The consideration need not be one moving directly from the mortgagee to the mortgagor; but any benefit to the mortgagor or to a stranger, or damage or loss to the mortgagee, rendered or sustained at the request of the mortgagor, is sufficient.² In a mortgage of indemnity the liability of the mortgagee to loss or damage is a sufficient consideration for the mortgage.³ A liability to loss on the part of the mortgagee is a consideration for a mortgage given to secure him against it, as much as is a direct benefit to the mortgagor, of whatever nature it may be.⁴

In Maryland, under a provision of statute that no mortgage shall be valid except as between the parties, unless there be indorsed thereon an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bond fide* as therein set forth,⁵ the want of such affidavit is fatal to the validity of the mortgage when it is assailed by a creditor, or by a subsequent *bond fide* purchaser.⁶ One claiming under the mortgagor with notice

¹ See §§ 64, 70, and chapters xxxii, division 3, and xxix, division 5; Vinton v. King, 4 Allen (Mass.), 562; Bush v. Cooper, 26 Miss. 599; Atwood v. Fisk, 101 Mass. 363, 366, per Ames, J.

² 1 Selwyn's N. P. 43; Magruder v. State Bank, 18 Ark. 9; Popple v. Day, 123 Mass. 520.

³ Simpson v. Robert, 35 Ga. 180.

⁴ Haden v. Buddensick, 4 Hun (N. Y.), 649.

⁵ Code, 1860, art. 24, § 29; Stat. 1846, c. 291. See § 366. This affidavit may be made at any time before the mortgage is recorded, before any one authorized to

take the acknowledgment of a mortgage, and the affidavit shall be recorded with the mortgage. Code, 1860, art. 24, § 29, p. 136.

The affidavit may be made by one of several mortgagees, or by an agent of a mortgagee, who shall, in addition to the above affidavit, make affidavit, to be indorsed on the mortgage, that he is such agent, which affidavit is proof of such agency; and the president, or other officer of a corporation, or the executor of the mortgagee, may make such affidavit. Ib. art. 20, § 30, p. 137.

⁶ Cockey v. Milne, 16 Md. 200.

stands in no better position in this respect than the mortgagor himself.¹

611. It is not necessary that any consideration should pass at the time of the execution of the mortgage. That may be either a prior or a subsequent matter. Mortgages are very frequently given to secure existing debts, in which cases the consideration is generally, altogether, a past one.² Moreover, the renewal of a note, or extension of the time of payment of a debt, is a sufficient consideration for a mortgage by a third person to secure such debt.³

Sometimes, however, a mortgage is made for the purpose of raising money by subsequent negotiation, in which case the consideration is subsequent, and the mortgage has no validity until it is transferred to some one for value, and it is then subject to any incumbrance intervening before the negotiation and record of it;⁴ but thereupon becomes valid as against the maker.⁵

612. Want of consideration, or the failure of it, is a good defence to an action upon the mortgage.⁶ A mortgage for a fixed sum, founded on no consideration except an undertaking to furnish goods which were never furnished, cannot be enforced, except in the hands of a *bond fide* purchaser for value.⁷ A mortgage given for future credit, if no advances are made upon it and no further credit is given, is without consideration. If taken for that purpose it cannot be enforced for a different purpose.⁸ The sum named in the deed as the consideration is of no importance when in terms the mortgage secures future advances.⁹ It is security for the advances actually made upon it, and for nothing further. When given to secure future advances, or the value of goods to be purchased, it is valid to the extent of the goods sold or the advances made on account of the mortgage, although the mortgagor be in fact insolvent at the time, and becomes bankrupt shortly afterwards.¹⁰

¹ Phillips v. Pearson, 27 Md. 242.

² Wright v. Bundy, 11 Ind. 398; Cooley v. Hobart, 8 Iowa, 358; Usina v. Wilder, 58 Ga. 178; Moore v. Fuller 6 Oreg. 272.

³ Magruder v. State Bank, 18 Ark. 9; Bank of Muskingum v. Carpenter, Wright (Ohio), 729.

⁴ See § 86; Schafer v. Reilly, 50 N. Y. 61; De Lancey v. Stearns, 66 N. Y. 157; Cady v. Jennings, 17 Hun (N. Y.), 213; Mullison's Estate, 68 Pa. St. 212; Johnson v. McCurdy, 83 Pa. St. 282.

⁵ Wood v. Condit, 34 N. J. Eq. 434.

⁶ § 1297; Hannan v. Hannan, 123 Mass. 441; Wearse v. Peirce, 24 Pick. (Mass.) 141; Smith v. Newton, 38 Ill. 230; Conwell v. Clifford, 45 Ind. 392.

⁷ Fisher v. Meister, 24 Mich. 447.

⁸ McDowell v. Fisher, 25 N. J. Eq. 93; Mitzner v. Kussel, 29 Mich. 229; Fisher v. Meister, 24 Mich. 447.

⁹ Miller v. Lockwood, 32 N. Y. 293.

¹⁰ Marvin v. Chambers, 12 Blatchf. 495.

When a mortgage has been intrusted to an agent for the purpose of raising money, and the agent uses it for another purpose either wholly or in part, as, for instance, to secure a judgment against other persons, such use is a misappropriation of it, such as will invalidate the security,¹ unless the assignee be entitled to the protection accorded to a *bond fide* holder of negotiable paper. If an agent who is authorized only to receive a conveyance of lands to his principal takes a conveyance to himself and makes a mortgage to one having notice of the fact, it is void as against the principal.² An officer or agent, who takes a mortgage to himself to secure the payment of a debt to his principal, holds it by implication of law as trustee for the principal.³

613. A mortgage under seal implies consideration at common law, and none need be proved, and it is good if it is shown that none was given. Neither courts of law nor equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want of consideration; but they will, for the purpose of ascertaining what is due upon it.⁴ In New Jersey it is provided by statute that the defence of fraud in the consideration of a deed may be made as fully as if the instrument were not under seal;⁵ and in New York a seal affords only presumptive evidence of a sufficient consideration; this presumption may be rebutted in the same manner and to the same extent as if the instrument were not under seal.⁶

614. A mortgage may be made by way of gift, when the rights of creditors are not thereby interfered with.⁷ When executed and delivered it is as valid as if it were based upon a full consideration. It is not open to the objection that it is a voluntary executory agreement, but may be enforced according to its terms as an executed conveyance.⁸

¹ Craver v. Wilson, 14 Abb. (N. Y.) Pr. N. S. 374; Davis v. Bechstein, 69 N. Y. 440.

² Wisconsin Bank v. Morley, 19 Wis. 62.

³ Rood v. Winslow, Walk. (Mich.) 340. In this case the mortgage was, to a county commissioner, the debt being due to the county.

⁴ Farnum v. Burnett, 21 N. J. Eq. 87; Calkins v. Long, 22 Barb. (N. Y.) 97; Parker v. Parmele, 20 Johns. (N. Y.) 130, 134; Maxwell v. Hartmann, 50 Wis. 660.

⁵ New Jersey: Laws 1871, p. 8; and see Feldman v. Gamble, 26 N. J. Eq. 494, 496.

⁶ New York: 3 R. S. 1875, p. 672; Craver v. Wilson, 14 Abb. (N. Y.) N. S. 374; Gray v. Barton, 55 N. Y. 68; Best v. Thiel, 79 N. Y. 15; Torry v. Black, 58 N. Y. 185.

⁷ Gale v. Gould, 40 Mich. 515.

⁸ Campbell v. Tompkins, 32 N. J. Eq. 170; Bucklin v. Bucklin, 1 Abb. App. Dec. (N. Y.) 242; Brooks v. Dalrymple, 12 Allen (Mass.), 102; Peabody v. Peabody, 59 Ind. 556.

But the fact that a mortgage is given without consideration may have an important bearing on any disputed question concerning the delivery or recording of it.¹

615. To support a mortgage made for the accommodation of another, there must be a consideration; but it is sufficient that this consideration arises upon the subsequent negotiation of the mortgage by the mortgagee. In states where a preëxisting debt is not regarded as a valid consideration, if the debt of a third person, which is secured by assigning the mortgage, be already incurred, there must be a new and distinct consideration for the obligation incurred by the mortgagor, as surety or guarantor of that debt. But if the debt secured be incurred at the same time that the mortgage is given, and this collateral undertaking enters into the inducement to the creditor for giving the credit, then the consideration for such contract is regarded as consideration also for the collateral undertaking by way of mortgage.²

A mortgage made for the accommodation of another, upon the understanding that the money should be realized in a particular manner, is not fraudulently misappropriated though the money be obtained in a way different from that which was intended, provided it be negotiated so that the substantial purpose for which it was designed is attained. It is not material that it be negotiated in the precise manner contemplated, unless the interest of the party making it be prejudiced by the manner in which it is used.³

616. A mortgagor may be estopped to deny a consideration for his mortgage. He is not, however, estopped from showing a failure or want of consideration for the note secured by the mortgage as against the mortgagee, except by his own representations or those made by others with his knowledge and consent.⁴ But this defence cannot be taken against an assignee for value before maturity.⁵ Such mortgage, though void between the original parties, is valid in the hands of a *bona fide* assignee without notice of the illegal consideration for which it was given.⁶

¹ Brigham v. Brown, 44 Mich. 59.

² Davidson v. King, 51 Ind. 224. See § 458.

³ Jacobsen v. Dodd, 32 N. J. Eq. 403; Duncan v. Gilbert, 29 N. J. L. 521; Wood v. Condit, 34 N. J. Eq. 434.

⁴ Jones v. Jones, 20 Iowa, 388; Wearse v. Peirce, 24 Pick. (Mass.) 141.

⁵ Cornell v. Hichens, 11 Wis. 353; Stillwell v. Kellogg, 14 Wis. 461.

⁶ Cazet v. Field, 9 Gray (Mass.), 329; Brigham v. Potter, 14 Gray (Mass.), 522; Taylor v. Page, 6 Allen (Mass.), 86; Earl v. Clute, 2 Abb. App. Dec. (N. Y.) 1, and cases cited. In North Carolina it is provided by statute that no conveyance or

It may thus happen that the mortgagee may, in effect, give a better title than he himself holds. "In the case of a conveyance of real estate to defraud creditors, the grantee cannot hold, but one who takes it from him without notice may. But the law goes further in favor of commerce, and gives a high degree of character and honor to bills of exchange and promissory notes in the hands of an indorsee, without actual or constructive notice of anything affecting their validity or credit."¹ But this rule does not apply to notes which are by statute made absolutely null and void, as notes made in violation of statutes against usury and gaming sometimes are.²

A certificate made by a mortgagee at the time of giving the mortgage that there is no defence to it, estops him as against a purchaser of the mortgage from setting up fraud or want of consideration.³ A married woman is estopped by such a certificate equally with any other mortgagor.⁴

A mortgagor may be estopped from denying the validity of his mortgage by reason of representations made with his knowledge and assent respecting its validity or based upon the assumption of its validity. Thus, where a trustee of a savings bank, to make up a deficiency in its assets caused by a loss for which the trustees were supposed to be personally liable, executed a mortgage which was assigned to the bank, he was not allowed to set up the defence of want of consideration, inasmuch as the mortgage was with his knowledge and assent reported to the banking department, and represented to the depositors of the bank as a portion of its assets, and the bank was upon the strength thereof, and of other similar securities, permitted to continue business.⁵

A note and mortgage deposited in escrow, and afterwards fraudulently taken and put in circulation, without the terms and conditions of the deposit having been complied with, are doubtless void in the hands of a purchaser or assignee for value with-

mortgage, made to secure the payment of a debt, shall be void in the hands of a purchaser for value without notice, for the reason that consideration of the debt was forbidden by law. *Battle's Revisal*, 1873, c. 50, § 5. This statute applies to usurious mortgages. *Coor v. Spicer*, 65 N. C. 401.

¹ Per Shaw, C. J., in *Cazet v. Field*, *supra*.

² *Bowyer v. Bampton*, 2 Stra. 1155;

Kendall v. Robertson, 12 Cush. (Mass.) 156.

³ *Schenck v. O'Neill*, 23 Hun (N. Y.), 209; *Hutchison v. Gill*, 91 Pa. St. 253. The court, in the latter case remark, that it is unnecessary to say what would be the effect of actual fraud in procuring the "no defence" paper.

⁴ *Smyth v. Munroe*, 19 Hun (N. Y.), 550; *Payne v. Burnham*, 62 N. Y. 69.

⁵ *Best v. Thiel* 79 N. Y. 15.

out notice. In such case the mortgage never has a legal existence, and the rules of commercial paper have no application to the note accompanying it, although it be negotiable in form.¹

2. *Illegal Consideration.*

617. **Illegality of consideration** avoids a mortgage, whether it consist in a violation of the common law or of a statute.² A mortgage given to secure a debt made illegal by statute, as, for instance, a debt incurred for intoxicating liquors illegally sold to the mortgagor, cannot be enforced; and such a mortgage is invalid, although not given to the seller of the liquors, but at his request to a creditor of his, who knew that the consideration was illegal.³ But if the mortgage be given for an illegal consideration, and the consideration not being performed the mortgagee enters to foreclose, and keeps possession till foreclosure is complete, he then has an absolute title, and the value of the land is applied by operation of law to the payment of the debt secured by the mortgage. The land is then irretrievably gone, unless the law be such that the illegal consideration, when paid, can be recovered back, not merely in money but in land. It has been held that a payment in land for intoxicating liquors illegally sold could not be recovered back, and therefore that upon the foreclosure of a mortgage for such a debt, the land cannot be recovered by the mortgagor.⁴

A mortgage by a citizen of Tennessee, executed to a citizen of Kentucky after the proclamation of the President declaring the State of Tennessee to be in a state of insurrection, and forbidding all intercourse with its inhabitants, was held void, although the land was situate in the State of Kentucky.⁵ A mortgage given in Tennessee during the civil war, in consideration of a loan in Confederate Treasury notes, was after the war held void, on the ground that the consideration of the contract was illegal, being notes issued by an unlawful confederation of states. Such contracts are against public policy, and the courts will not lend their aid to enforce them.⁶ But on the contrary, such a mort-

¹ § 87; *Chipman v. Tucker*, 38 Wis. 43; S. C. 20 Am. Rep. 1; *Andrews v. Thayer*, 30 Wis. 228; *Walker v. Ebert*, 29 Wis. 194; *Tisher v. Beckwith*, 30 Wis. 55; *Burson v. Huntington*, 21 Mich. 415; *Powell v. Conant*, 33 Mich. 396; *Cresinger v. Dessenburg*, 42 Mich. 580.

² *Gilbert v. Holmes*, 64 Ill. 548.

³ *Baker v. Collins*, 9 Allen (Mass.), 253.

⁴ *McLaughlin v. Cosgrove*, 99 Mass. 4.

⁵ *Hyatt v. James*, 2 Bush (Ky.), 463.

⁶ *Stillman v. Looney*, 3 Cold. (Tenn.) 20.

gage was sustained in Alabama, on the ground that it was valid under the *de facto* government existing when it was executed.¹

618. Contrary to public policy. — If land be conveyed to one absolutely as security for a sum of money to be due him upon his doing an unlawful act, as, for instance, procuring witnesses to testify to a certain state of facts in behalf of the grantor, the transaction is not a mortgage. The title is not divested upon the grantor's failure to perform the illegal stipulation, but is absolute in him, and the grantor cannot recover it either in law or in equity.²

A mortgage executed in consideration that the mortgagee would use his efforts to obtain a *nolle prosequi* to an indictment pending against the mortgagor is against public policy and void.³ So is one given in composition of a felony, or of a promise not to prosecute for a crime of lower degree than a felony.⁴ A note and mortgage given in lieu or in renewal of a note and mortgage, void for this reason, are equally void, even in the hands of an assignee for value but with notice of the illegality of the consideration.⁵

A mortgage, or a deed in the nature of a mortgage, given to secure the performance of a contract contrary to the policy of the law, will not be enforced by a court of equity; such, for instance, is a contract which is subject to the objection of champerty.⁶

A mortgage given upon lands held by a settler under the pre-emption act, before he has entered the lands at the land office, is void under the act of Congress forbidding any conveyance before such entry.⁷

619. Who may take advantage of the illegality. — As a general rule contracts prohibited by statute are void, and courts will neither enforce them nor aid in the recovery of money paid in pursuance of them. "The meaning of the familiar maxim, *In pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions

¹ Scheible v. Bacho, 41 Ala. 423; Micou v. Ashurst, 55 Ala. 607.

² Patterson v. Donner, 48 Cal. 369.

³ Wildey v. Collier, 7 Md. 273.

⁴ Collins v. Blanton, 2 Wils. 341, 350; Atwood v. Fisk, 101 Mass. 363.

⁵ Pierce v. Kibbee, 51 Vt. 559.

⁶ Gilbert v. Holmes, 64 Ill. 548.

⁷ See § 176; Brewster v. Madden, 15 Kans. 249. See, as to mortgage of cemetery lot, Lantz v. Buckingham, 4 Laus. N. Y. (484).

in such cases without the aid of the courts."¹ The principle in such cases is the same in equity as at law: while the courts will not aid the mortgagee to enforce payment of an illegal mortgage, they will not aid the mortgagor to obtain a cancellation of the incumbrance. Both parties are left without remedy, when the contract is one that is prohibited as immoral or against public policy.² When the illegal consideration has been paid to one of two persons interested in it, the court will not aid the other to recover his share of it; it does not enforce the sentiment of "Honor among thieves."³

In a recent case in Nevada this principle was carried to the extent of declaring void a mortgage given for a full, adequate, and legal consideration, merely because the mortgagee had the mortgage given to a non-resident of the state for the purpose of enabling him to escape taxation upon the amount of the loan. Although the revenue laws of the state contained no prohibition of such a contract, the mortgage was nevertheless declared illegal, as against the policy of the law, and the court refused for that reason only to enforce it against the mortgagor.⁴ And it was held, moreover, that it was immaterial that the mortgagee afterwards paid the full amount of taxes upon the money loaned. The fraud, it was said, consisted in the turpitude of the motive which influenced the mortgagee at the time of the execution of the mortgage.⁵

¹ *Atwood v. Fisk*, 101 Mass. 363, per Mr. Justice Ames.

² *James v. Roberts*, 18 Ohio, 548; *Snyder v. Snyder*, 51 Md. 77. See, however, *Sackner v. Sackner*, 39 Mich. 39.

³ *Woodworth v. Bennett*, 43 N. Y. 273.

In the language of Lord Chief Justice Wilmut, "You shall not stipulate for iniquity; all writers upon our law agree in this, no polluted hand shall touch the pure foundations of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O! procul este profani.*" *Collins v. Blanton*, 2 Wils. 341, 350.

⁴ *Drexler v. Tyrrell*, 15 Nev. 114.

⁵ But the cases cited in support of the decision are cases in which the consideration of the contract, as between the parties themselves, was either illegal or contravened the policy of the law. In the case before the court, however, there was nothing illegal in the contract as between the parties. It was a contract they were not prohibited from making and there was a full and complete consideration for it. The only taint in the transaction was the intended fraud upon the revenue laws of the state. For this intended fraud the court upheld the mortgagor in refusing payment of the mortgage; they upheld him in a monstrous injustice, when the revenue laws of the state provided proper and ample punishment for an evasion of them by criminal prosecution. The decision is regarded as wrong in principle.

Gaming contracts, contracts made on Sunday, contracts of champerty and maintenance, contracts made in composition of felony, and many others of like nature, might be mentioned as examples. But sometimes contracts are prohibited for the mere protection of one of the parties against an undue advantage which the other party is supposed to possess over him. In such cases the parties are not regarded as being equally guilty, and so the rule is not deemed applicable, though both have violated the law.¹ As an example of this kind, a usurious contract is mentioned, which may be void as to the mortgagee while valid as to the mortgagor.

In accordance with this distinction, a law providing that school funds shall be loaned only upon unincumbered real estate does not render void a mortgage taken in violation of this statute by the officer charged with making the loan. The mortgagor cannot claim that such a mortgage is illegal and cannot be enforced against him.² And so under the national banking law a mortgage for a loan upon real estate security, though impliedly prohibited, is valid between the parties.³

A statute providing that a trustee, before entering upon the discharge of his duties, shall give a bond for the faithful discharge of his duties, does not prevent the legal estate vesting in him under a mortgage or deed of trust regularly executed.⁴

620. The mortgage may be upheld for such part of the consideration as was free from the taint of illegality, when the consideration of a mortgage is made up of several distinct transactions, some of which are legal and others are not, and the one can be separated with certainty from the other.⁵ In equity a mortgage securing a debt usurious in part, but valid in part, may be upheld for the latter, although in terms the statute of usury makes the obligation void altogether. Thus, where the maker of such a mortgage comes into equity, and asks that such a mortgage be surrendered as a cloud on the title to his lands,

¹ *Deming v. State*, 23 Ind. 416. See *Raguet v. Roll*, 7 Ohio, 77; S. C. 4 Ib. 419; *Cowles v. Raguet*, 14 Ohio, 38; *McQuade v. Rosecrans*, 36 Ohio St. 442. An important element in this case was that Raguet not only agreed not to prosecute, but agreed to use his influence to prevent a prosecution.

² *Deming v. State*, 23 Ind. 416. And see *Mann v. Best*, 62 Mo. 491.

³ *Nat. Bank v. Matthews*, 98 U. S. 621; S. C. 19 Alb. L. J. 132; 13 West. Jur. 176.

⁴ *Gardner v. Brown*, 21 Wall. 36.

⁵ *Feldman v. Gamble*, 26 N. J. Eq. 494; *Corbett v. Woodward*, 5 Sawyer, 403; *Williams v. Fitzhugh*, 37 N. Y. 444, applied to usury; *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Cook v. Barnes*, 36 N. Y. 520; and see *Carleton v. Woods*, 28 N. H. 290.

and that the court will so direct, although it cannot require him to pay the usurious debt, or any part of it, it may require him to pay the other part of it which at law and in equity he owes. The court will require him to do equity before it will administer the relief asked for.¹

A mortgage fraudulently made to include a sum not due or which had been paid, the consideration being entire, and the purpose of the transaction being to defraud creditors, is absolutely void.² But if the sum secured be made up in part of a sum inadvertently included and without fraudulent intent, then the mortgage may be valid for the actual debt secured, and void as to the rest.³

When part of the consideration of a note and mortgage is the suppression of a criminal prosecution against the mortgagor, he can avail himself of this fact as a defence to a suit to enforce either of them, although the prosecution is for an embezzlement of funds, by which the mortgagor not only committed a crime but incurred a debt. The effect upon the mortgage in such case is the same as if the whole consideration had been illegal. The illegal part cannot be separated from the legal, but the illegality taints the whole.⁴

621. A mortgage may be valid in part and void in part.⁵ A mortgage of land and slaves, executed while slavery was recognized, was vitiated by the abolition of slavery only as to the lien upon the slaves.⁶

Where a bond of defeasance was assigned by a debtor to a creditor, who paid the debt to secure which the conveyance was made, whereupon the land was conveyed to him, and he gave the debtor a new bond conditioned for the reconveyance of the land upon the payment of the amount of both debts, the transaction, so far as the debt of the second creditor was secured, was void under the insolvent laws; but the conveyance being a valid security for the first debt, the land was a valid security in the hands of the second creditor for the amount paid by him to the first creditor.⁷

¹ *Williams v. Fitzhugh*, 37 N. Y. 444.

² *McQuade v. Rosecrans*, 36 Ohio St. 442.

³ *Weeden v. Hawes*, 10 Conn. 50.

⁴ *Atwood v. Fisk*, 101 Mass. 363, 366, per Ames, J.

⁵ *Leeds v. Cameron*, 3 Sum. 488; *John-*

son v. Richardson, 38 N. H. 353; *Rood v. Winslow*, 2 Dougl. (Mich.) 68; *S. C. Walk. (Mich.)* 340; *McMurray v. Connor*, 2 Allen (Mass.), 205.

⁶ *Lavillebeuvre v. Frederic*, 20 La. Ann. 374.

⁷ *Judd v. Flint*, 4 Gray (Mass.), 557.

A mortgage given by a third person at the solicitation of another to secure his debts for a specific purpose, as, for instance, the purchase price of certain goods about to be sold him, if fraudulently made to cover in part an existing indebtedness, is void as to such part of it, though valid as to the part used for the purpose intended. Although the mortgagee has taken such mortgage in good faith, if he has not put himself in any worse position in regard to the old indebtedness, and if he has not done anything or parted with anything in reliance upon the mortgage, he cannot claim that the surety should suffer for the fraud by reason of negligence in executing the mortgage which rendered the fraud possible.¹

622. The burden of proof is upon the party who sets up the defence of want of consideration or illegality of it, to make it out by clear and strong proof.² A mortgage in due form and duly executed implies a valid consideration.

Evidence of the payment of interest upon a mortgage is admissible to show its validity when this is disputed.³

3. *Mortgages executed on Sunday.*

623. Mortgage for debt contracted on Sunday.— The statutes forbidding the transaction of business on Sunday have the effect to render void all contracts executed upon that day.⁴ It has sometimes been said that such contracts, being immoral and illegal only as to the time they are entered into, may be affirmed upon a subsequent day, and thus made valid.⁵ But it seems incorrect to say that a mere ratification can impart legal efficacy to a contract which has no legal existence.⁶ The logical theory would seem to be that nothing but an express promise subse-

¹ Smith v. Osborn, 33 Mich. 410.

² Stuart v. Phelps, 39 Iowa, 14; Feldman v. Gamble, 26 N. J. Eq. 494; Brigham v. Potter, 14 Gray (Mass.), 522.

³ Floyd Co. v. Morrison, 40 Iowa, 188.

⁴ Under the Massachusetts statute of 1791, prohibiting the doing of any manner of labor, business, or work, between the midnight preceding and the sunset of the Lord's day, and declaring void the execution of any civil process from the midnight preceding to the midnight following that day, it was held that a mortgage executed, acknowledged, and recorded, after sunset on Sunday evening,

was not void. Tracy v. Jenks, 15 Pick. (Mass.) 465; Meader v. White, 66 Me. 90.

⁵ Adams v. Gay, 19 Vt. 358, per Redfield, J. See Tucker v. West, 29 Ark. 386, for a review of the Sunday laws of many of the states.

⁶ "The parties cannot legalize that which the law has declared illegal. It is competent to them to impart new efficacy to a voidable act, but they have no power to give life to an act, which, from reasons of public policy, has been ordained by the legislative authority to be absolutely void." Per Chief Justice Beasley, in Reeves v. Butcher, 31 N. J. L. 224.

quently made, founded upon the consideration emanating from the illegal contract, will avail to support an action having that consideration for its basis. Upon this theory it was held that although a promissory note made and delivered on Sunday for a loan of money made at the time is illegal and cannot be enforced, yet the obligation to return the money is a sufficient consideration to support a mortgage subsequently given to secure it. The mortgage constitutes a new promise founded on such obligation, and having no taint of illegality, such as the note had, it may be enforced.¹

But a mortgage executed on Sunday, without the knowledge of the mortgagee, and dated, acknowledged, and delivered on the following day, is not void. The mortgagor is estopped from showing that the instrument was executed on a day other than that of which it bears date.²

When a deed of land was executed and delivered on Sunday, to indemnify the mortgagee, and under an oral agreement that he should hold the land in trust for the mortgagor after satisfying his claim, in accordance with which agreement a declaration of trust was afterwards executed, it was held that the fact that the deed was executed and delivered on Sunday did not entitle the grantee to hold the land discharged of the trust.³ The rule, that no action based on a contract made on Sunday can be maintained to enforce its obligations in favor of either party, cannot be so applied as to enlarge the interest conveyed by the grantor, or to defeat his equitable title. "The apparent title conveyed," says Mr. Justice Colt, "was qualified by the trust imposed upon it, as effectually as if the terms of the trust were contained in the deed itself. Neither party to the transaction, nor those claiming under them, can be permitted to take advantage of the alleged illegal act. The title, such as it was, passed to the grantee, and was held, as we have found, in trust. The purpose of the trust declared was neither immoral, contrary to the statutes, nor contrary to public policy; the only illegality charged is in the time when, by the conveyance and agreement, the trust was created. Under such circumstances the law does not interfere to

¹ *Gwinn v. Simes*, 61 Mo. 335. In *Harrison v. Colton*, 31 Iowa, 16, it is held that a contract made on Sunday may be afterwards ratified. See *Heller v. Crawford*, 37 Ind. 279.

² *Wilson v. Winter* (C. C. Wis. 1881), 6 Fed. Rep. 16.

³ *Faxon v. Folvey*, 110 Mass. 392. See *Hall v. Corcoran*, 107 Mass. 251, and cases cited; *Myers v. Meinrath*, 101 Mass. 366.

undo what the parties have done, by setting aside their deeds. Neither party can now assert rights inconsistent with the conveyances."

4. *Fraudulent Mortgages.*

624. A mortgage obtained by fraud is void, and a discharge of it may be decreed in equity.¹ When a deed of land has been procured by fraud, and the grantee has conveyed it to a purchaser in good faith, so that the land itself is beyond the reach of the grantor,² yet, if such purchaser has given a mortgage for a portion of the purchase money to the party who fraudulently obtained the deed, he may in equity be compelled to transfer the mortgage to the party defrauded. It is an established doctrine, that when the legal estate has been acquired by fraud, the taker may in equity be regarded as trustee of the party defrauded, who may recover the estate or its avails when these can be distinctly identified.³ A bill to set aside a mortgage procured by fraud may be filed by one of several mortgagors who have secured the several notes of each by a joint mortgage of one tract of land;⁴ or several mortgagors may join as plaintiffs in a bill to obtain a cancellation of a note and mortgage, though the note secured was executed by only one of them.⁵ It has been held to be fraud in a creditor to induce his debtor to secure an old debt by mortgage upon the condition of advancing a further sum, and when he has obtained the security to refuse to make the advance, and a court of equity will annul the conveyance. In such case the mortgagee cannot claim that there is no loss, and that therefore the mortgage is *damnum absque injuria*. The mere existence of the mortgage is itself an injury, and an action to enforce it a greater.⁶ But the better view is that such a transaction does not afford ground for cancelling the mortgage in equity, though it might support an action at law for the injury sustained by reason of the breach of agreement.⁷

The fact that the mortgagor is in possession, and can maintain his possession against the mortgagee at law, does not prevent his maintaining a bill to set aside a fraudulent mortgage.⁸

¹ *Mason v. Daly*, 117 Mass. 403; *Wartemberg v. Spiegel*, 31 Mich. 400; and see *Richardson v. Barrick*, 16 Iowa, 407; *Terry v. Tuttle*, 24 Mich. 206; *Wright v. Morgan*, 4 Baxter (Tenn.), 385.

² *Jordan v. McNeil*, 25 Kans. 459.

³ *Cheney v. Gleason*, 117 Mass. 557.

⁴ *Moulton v. Lowe*, 32 Me. 466.

⁵ *Bowman v. Gormy*, 23 Kans. 306.

⁶ *Gross v. McKee*, 53 Miss. 536.

⁷ *Johnson v. Murphy*, 60 Ala. 288.

⁸ *Marston v. Brackett*, 9 N. H. 336.

A party seeking to avoid his contract upon the ground of fraud can do so only by making prompt complaint.¹

A mortgage given to secure a forged note is void. Thus a mortgage given by a wife upon her separate property for the accommodation of her husband's firm is rendered void by the forgery of her name, as a joint maker with her husband, of the note intended to be secured, even in the hands of an innocent assignee.²

625. A fraudulent intent on the part of the mortgagee in obtaining the mortgage must be shown to render it void.³ To have this effect, it is necessary that there should be something more than mere folly on the part of the mortgagor. A mortgagee may meet an allegation that a mortgage was obtained through his false and fraudulent representations, by evidence that the mortgagor executed the mortgage without his solicitation. The weight to be given to the evidence is a question for the jury.⁴ A fraudulent misrepresentation as to the value of property sold by the mortgagee, in payment of which he has taken a mortgage, does not avoid the mortgage if there was any value at all in the property sold. The property which was the subject of the sale and mortgage must first be restored to the vendor, or a reconveyance tendered, before the mortgage can be rescinded.⁵

The representation of a mortgagee that he would not enforce the mortgage is no defence to it, because such a parol promise cannot be offered in evidence.⁶

The mere fact that a mortgagor was unable to read and that the mortgage was not read to him, does not enable him, in the absence of proof of fraud on the part of the mortgagee, to object that the instrument contains an unauthorized stipulation, especially when it was drawn by his own agent.⁷

626. A mortgage obtained by duress is void. A mortgage obtained through threats of a groundless prosecution is void, and a court of chancery will restrain its collection.⁸ Relief may

¹ *Wright v. Peet*, 36 Mich. 213.

⁵ *Sanborn v. Osgood*, 16 N. H. 112.

² *Morsman v. Werges* (C. C. Iowa, 1880), 3 Fed. Rep. 378.

⁶ *Catlin v. Fletcher*, 9 Minn. 85.

³ See chapter xxxii, division 3, and chapter xxix, division 5; *Clarke v. Forbes*, 9 Neb. 476; *Murphy v. Moore*, 23 Hun (N. Y.), 95.

⁷ *Wilson v. Winter* (C. C. Wis. 1881), 6 Fed. Rep. 16.

⁴ *Blackwell v. Cummings*, 68 N. C. 121.

⁸ *James v. Roberts*, 18 Ohio, 548; *Eyster v. Hatheway*, 50 Ill. 521; and see *Lightfoot v. Wallis*, 12 Bush (Ky.), 498.

be granted against a mortgage extorted by a son from his parents by oppressive means, and for an inadequate consideration, while he practically occupied the position of guardian over them and their property.¹ A mortgage executed by a wife, on her separate property, to secure a debt of her husband, under his threat to abandon her if she refused, may be avoided by her if the mortgagee was aware of such threat at the time the mortgage was executed.² A mortgage executed by a wife upon her property to secure a debt of the husband, under the inducement of false and fraudulent charges of embezzlement against the husband, and threats to institute criminal proceedings against him, is void.³ It is even held that a mortgage obtained from a married woman by duress on the part of the husband is void, although the mortgagee took no part in procuring it, on the ground that he allowed the husband to act as his agent, and is bound by his acts.⁴ But a married woman cannot set up the invalidity of her signature to a mortgage of her homestead on the ground that not being able to read she relied on the representations of her husband that the instrument was a note and was of no consequence ;⁵ for it was gross negligence in her not to require the instrument to be read to her.⁶ A married woman as well as any one else may be estopped by her deliberate conduct.⁷

The fraud or duress of a husband in procuring his wife's release of homestead does not invalidate the mortgage unless the mortgagee had knowledge of or shared in the wrongful acts of the husband.⁸ But where her separate acknowledgment is made essential to a conveyance of her separate estate, if she execute a mortgage during her minority she cannot ratify it by paying interest or doing any like act after coming of age. She can only ratify it in the way she could originally execute it, that is, by making a separate acknowledgment of the deed as required by statute. Doubtless she would be estopped in case she had deliberately de-

¹ *Bowe v. Bowe*, 42 Mich. 195.

² *Line v. Blizzard*, 70 Ind. 23.

³ *Singer Manufacturing Co. v. Rawson*, 50 Iowa, 634. It is immaterial that the property was purchased by the husband with money of the party making the threats, and fraudulently conveyed to the wife.

⁴ *Central Bank of Frederick v. Copeland*, 18 Md. 305.

⁵ *Ætna Life Ins. Co. v. Franks*, 53 Iowa, 618.

⁶ *Roach v. Karr*, 18 Kana. 529 ; *Frickee v. Donner*, 35 Mich. 151.

⁷ *Norton v. Nichols*, 35 Mich. 148 ; *Lefebvre v. Dutruit*, 51 Wis. 326 ; *Edgell v. Hagens*, 53 Iowa, 223 ; *Van Sickles v. Town*, 53 Iowa, 259.

⁸ *Ætna Life Ins. Co. v. Franks*, 53 Iowa, 618 ; *Edgell v. Hagens*, 53 Iowa, 223.

ceived the mortgagee by falsehood; but otherwise her deed would be voidable and could be confirmed only in the manner indicated.¹ A mortgage given under threats by the creditor of a criminal prosecution for a felony, unless the debt be secured, is not void if the debt was actually due, and the debtor was in duty bound to pay or secure it. The giving of the mortgage in such case is not the compounding of a felony.² But if a mortgage be given without consideration under threats of a groundless prosecution, a court of equity will grant relief and restrain the collection of it.³

Although the general rule is that one person cannot avoid an obligation by reason of duress to another, there are exceptions to this in case the duress be of the husband or wife, or of parent or child. Thus a father may avoid a mortgage which he has been induced to sign by threats of the prosecution and imprisonment of his son.⁴

To avoid a mortgage on account of duress by imprisonment, it must appear that the imprisonment was unlawful, and that it was executed in order to obtain a release from it. "If I be arrested upon good cause, and being in prison, or under arrest, I make an obligation, feoffment, or any other deed to him at whose suit I am arrested, for my enlargement, and to make him satisfaction, this shall not be said to be by duress, but is good, and shall bind me."⁵ A mortgage given to a county to secure the payment of a sum of money, as the condition of a pardon, is not void as being given under duress.⁶ And so a mortgage given by a defaulting county treasurer, to secure the amount of his debt to the county, is a voluntary obligation and valid.⁷

A mortgage given for a legal debt, but with the motive not to incur the risk of offending a wealthy and influential friend, who might prove highly serviceable to the mortgagor and his family, is not given under duress.⁸ A mortgage given in consequence of

¹ *Ledger Building Asso. v. Cook* (Pa. 1879), 7 Reporter, 409; S. C. 19 Alb. L. J. 281; *Williams v. Baker*, 71 Pa. St. 476.

² *Plant v. Gunn*, 2 Woods, 372.

³ *James v. Roberts*, 18 Ohio, 548. See *Raguet v. Roll*, 7 Ohio, 76; *Cowles v. Raguet*, 14 Ohio, 38.

⁴ *Harris v. Carmody*, 131 Mass. 51.

⁵ 1 Shep. Touch. 62; and see *Watkins v. Baird*, 6 Mass. 506; *Plant v. Gunn*,

Woods, 372; *Smillie v. Titus*, 32 N. J. Eq. 51. In the reporter's note to this case many authorities are cited.

⁶ *Rood v. Winalow*, 2 Doug. (Mich.) 68.

⁷ *Oconto County v. Hall*, 42 Wis. 59; *State Bank of Bay City v. Chapelle*, 40 Mich. 447.

⁸ *Dolman v. Cook*, 14 N. J. Eq. 56.

threats made by the creditor to resort to legal proceedings to collect a valid debt is not given under duress.¹

Whether the use of a criminal prosecution to obtain securities renders them absolutely void and incapable of being enforced, or voidable only so that they may be confirmed by subsequent acts of ratification, depends upon the circumstances of the case, and particularly upon the question whether the prosecution was instituted for the sole purpose of extorting the securities, or was justifiable in itself and not necessarily instituted for that purpose, or conducted in an oppressive manner, and there was just consideration for the securities if properly obtained. Thus, a wife having left her husband on the ground of his adultery, with the purpose of remaining away from him and of filing a bill for separate maintenance, made a criminal complaint and procured his arrest for the crime. The guilt of the husband was unquestionable, and he settled the prosecution by giving to a trustee a mortgage for the benefit of the complainant conditioned for the payment of a certain sum semi-annually during her life. The wife afterwards filed a bill for divorce without making claim to any allowance and obtained a decree. The husband made the semi-annual payment for about two years, but then refused to make further payments, and a bill was filed to foreclose the mortgage. Upon the question whether the mortgage was void, or voidable only, and so confirmed by the payments, the Supreme Court of Michigan was evenly divided, the disagreement turning largely upon the motives of the criminal prosecution.²

627. Mortgages made to defraud creditors.³ — Except under bankrupt and insolvent laws, a mortgage made with the intent to prefer one creditor to another is valid,⁴ although a mortgage made with the intent upon the part of the mortgagor to hinder, delay, and defraud his creditors is void at common law and by statute, generally, except in case the mortgagee did not participate in or have knowledge of such intent.⁵ Such mortgage can be declared void as to him only upon proof of his knowledge

¹ *Snyder v. Braden*, 58 Ind. 143.

² *Lyon v. Waldo*, 36 Mich. 345. *Graves and Campbell, JJ.*, holding the mortgage void, and *Cooley, C. J.*, and *Marston, J.*, holding it voidable only, and cured by ratification; able opinions being delivered on each side.

³ See *Jones on Chattel Mortgages*, §§ 333-551.

⁴ *Giddings v. Sears*, 115 Mass. 505.

⁵ *Price v. Masterson*, 35 Ala. 483; *State v. Nauert*, 2 Mo. App. 295; *Prenser v. Henshaw*, 49 Iowa, 41; *McMaster v. Campbell*, 41 Mich. 513; *Thorpe v. Thorpe*, 12 S. C. 154.

of the fraudulent intent.¹ It is incumbent upon the mortgagee to show that the mortgage was made for a valuable and adequate consideration; and when that appears, the burden of proving a fraudulent intent on his part rests with the creditors who assail the transaction. Proof of the embarrassed condition of the mortgagor at the time, and of the mortgagee's relationship to him, is insufficient to establish a fraudulent intent;² as is also the fact that the mortgagor immediately afterwards executed a general assignment in favor of his creditors.³ When the object of a mortgage is solely to secure a debt to the mortgagee, it is not fraudulent at common law, although both the debtor and creditor knew that the effect of it would be to put the property out of the reach of other creditors.⁴

If one of the purposes of making a mortgage was to put the property out of the reach of the mortgagor's creditors, although the principal purpose of the parties was to secure a *bond fide* debt of the mortgagee, it is nevertheless void as to his creditors.⁵

The circumstance that a mortgage is made in the form of an absolute conveyance by a debtor in failing circumstances to a creditor is no evidence of an intention to defraud other creditors.⁶ But in Alabama such a conveyance is fraudulent and void as against existing creditors, although there may have been no actual intent to defraud. An equity of redemption is property which is capable of being subjected to the payment of debts, in courts of law and of equity; and a transaction, whereby an embarrassed debtor conceals its existence from his creditors, must hinder and delay them.⁷

Neither is a mortgage fraudulent as to creditors because it is given for a greater sum than is due, but in fact to cover, in part, future advances, although it does not express upon its face that the excess is for future advances.⁸ It would be fraudulent, however, if not given in good faith, and the securing of future advances be only a pretence.⁹

¹ Hall v. Heydon, 41 Ala. 242; Tickner v. Wiswall, 9 Ala. 305; Wiley v. Knight, 27 Ala. 336.

² Troy v. Smith, 33 Ala. 469; Crawford v. Kirksey, 55 Ala. 282; Banfield v. Whipple, 14 Allen (Mass.), 13; Thorpe v. Thorpe, 12 S. C. 154.

³ Lyon v. McIlvaine, 24 Iowa, 9; Lampson v. Arnold, 19 Ib. 479.

⁴ Giddings v. Sears, 115 Mass. 505.

⁵ Crowninshield v. Kittridge, 7 Met. (Mass.) 520; Robinson v. Stewart, 10 N. Y. 189; Schmidt v. Opie, 33 N. J. Eq. 138; Holt v. Creamer, 34 N. J. Eq. 181; Heintze v. Bentley, Ib. 562.

⁶ Doswell v. Adler, 28 Ark. 82, and cases cited.

⁷ Sims v. Gaines, 64 Ala. 392.

⁸ Tully v. Harloe, 35 Cal. 302; Goff v. Rogers, 71 Ind. 459.

⁹ Tully v. Harloe, *supra*.

If given to secure existing liabilities, a mortgage is not void as to creditors, because it does not specify the amount secured ;¹ nor because the sum secured was made up in part by an allowance of interest not recoverable at law upon the debt,² or that it includes debts due to other persons which the mortgagee verbally promises to pay.³

628. A mortgage may be fraudulent with reference to a particular creditor of the mortgagor, as, for instance, against a mechanic, who was induced to delay the signing of a contract for the building of certain houses until the landowner had executed and recorded a mortgage without consideration to a third person, with the intention that the mortgagee should enter under it, and defeat the lien of the mechanic. The mechanic in such case is entitled to maintain a bill to restrain an assignment of the mortgage, and to compel its cancellation, even before the houses are completed and the money under the contract has become due. The priority of lien to which the mechanic is entitled may be secured to him beforehand, for his security is impaired by the fraudulent mortgage, and he is exposed to the chance that the mortgage may pass into the hands of a *bond fide* assignee for value.⁴

When an existing mortgage is exchanged under a false pretence that the title is to be cleared, and before giving the new mortgage in exchange the mortgagor makes another mortgage with the purpose of giving it priority, even if this be an honest mortgage, but given to secure an old debt, the mortgagee in this is in no position to object to the restoration of the old mortgage in behalf of the original mortgagee.⁵

629. Fraudulent preferences. — A mortgage given to secure a debt to a creditor, who has, with others, executed a composition with a debtor to accept a portion of their claims in satisfaction, under a secret arrangement whereby the debt of such creditor is to be paid in full, is a fraud upon the other creditors, and is void.⁶

But a mortgage made with the intent to give the mortgagee an

¹ *Youngs v. Wilson*, 27 N. Y. 351, reversing S. C. 24 Barb. (N. Y.) 510.

² *Spencer v. Ayrault*, 10 N. Y. 202.

³ *Carpenter v. Muren*, 42 Barb. (N. Y.) 300.

⁴ *Hulsman v. Whitman*, 109 Mass. 411. Mortgage by husband to defeat collection of judgment for alimony. *Dugan v. Trialer*, 69 Ind. 553.

⁵ See § 967; *Eggeman v. Harrow*, 37 Mich. 436.

⁶ *Feldman v. Gamble*, 26 N. J. Eq. 494, and cases cited; *Lawrence v. Clark*, 36 N. Y. 128.

See *Jones on Chattel Mortgages*, §§ 356-366.

unlawful preference is not affected by that fact, if such intent was not carried out.¹

A mortgage made with the intent to prefer contrary to law is void against the assignee in bankruptcy of the mortgage, although the property be a homestead, and exempted from execution.²

To render a mortgage made by an insolvent debtor void as a preference under the bankrupt law,³ it was necessary for the assignee to show affirmatively that the mortgagee had reasonable cause to believe that the mortgagor was insolvent at the time he executed the mortgage, and that it was made with intent to defeat the bankrupt law.⁴

Though a mortgage be fraudulent and void as to a creditor, the mortgagor cannot avoid it.⁵ Such a mortgage conveys the property, and is binding between the parties.⁶ Although the mortgagee has participated in the fraudulent intent, it is voidable only at the election of the creditors. If they do not intervene the conveyance stands.⁷ The mortgagor will not be heard to allege his own fraud.⁸

630. Who may take advantage of the fraud. — A creditor of the mortgagor, after levying execution on the equity of redemption and purchasing it at the sheriff's sale, may prove that a second mortgage, or a release of the equity to the second mortgagee by the mortgagor, is fraudulent and void by reason of fraud practised on the mortgagor, although the mortgagor himself has made no attempt to avoid it.⁹ So may a purchaser of the equity of redemption, upon execution sale, maintain an action to set aside a deed on account of fraud.¹⁰ A subsequent judgment creditor may show that a prior mortgage was executed fraudulently and without consideration, in an action by the mortgagee against the owner and such judgment creditor, to foreclose the mortgage; and the mortgage may in such suit be subjected to the priority of the judgment.¹¹

The right to impeach a mortgage as fraudulent and void as to

¹ *Corbett v. Woodward*, 5 Sawyer, 403.

² *Beals v. Clark*, 13 Gray (Mass.), 18.

³ Bankrupt Act of March 2, 1867, § 35; 14 Stat. at Large 534. See *Jones on Chattel Mortgages*, § 360.

⁴ *Barbour v. Priest*, 103 U. S. 293.

⁵ See § 626; *Stores v. Snow*, 1 Root (Conn.), 181; see *Abbe v. Newton*, 19 Conn. 20; *Salmon v. Bennett*, 1 Conn. 525.

⁶ *Parkhurst v. McGraw*, 24 Miss. 134.

⁷ *Harvey v. Varney*, 98 Mass. 118, and cases cited; *Upton v. Craig*, 57 Ill. 257.

⁸ Per *Shaw, C. J.*, in *Dyer v. Homer*, 29 Pick. (Mass.) 253.

⁹ *Van Deusen v. Frink*, 15 Pick. (Mass.) 449.

¹⁰ *Matson v. Capelle*, 62 Mo. 235.

¹¹ *Kelly v. Lenihan*, 56 Ind. 448.

creditors of the mortgagor does not pass to his assignee by a voluntary general assignment in trust for the benefit of his creditors subsequently executed, and unaffected by any statute in force at the time, for the assignee's relations to the creditors are solely those created by the instrument of assignment.¹

.631. A mortgagor is not estopped from setting up the invalidity of his mortgage, unless there has been some fraud, misrepresentation, or concealment on his part.² But he is estopped from setting up any defence which is inconsistent with representations made by him in obtaining the loan which the mortgage was given to secure, when the lender has relied upon these representations in making the loan and taking the mortgage. Thus, if a mortgagor induce a person to purchase the mortgage by a statement or certificate that a certain sum is due upon it, and that there is no offset or defence to it, the borrower is precluded from claiming that this sum is not the true amount due, or that the mortgage is void, either wholly or in part, for usury.³ But if the purchaser of the security did not believe the existence of the facts in reference to which the estoppel is sought to be interposed, and did not act upon any such belief, the mortgagor is not estopped to show the real facts of the case.⁴ To create a valid estoppel, the holder of the mortgage must have purchased in reliance upon the truth of the representations. Therefore, where a mortgage and a certificate accompanying it that the mortgage was given "for a good and valid consideration to the full amount thereof, and that the same is subject to no offset or defence whatever," were both procured by fraud, and the purchaser did not rely upon the truth of the certificate, but upon the effect of it, as a matter of law, to protect him, it was held that the mortgagor could still set up the fraud in defence to the mortgage.⁵

¹ *Flower v. Cornish*, 19 Alb. L. J. 282; S. C. 25 Minn. 473.

² *Brewster v. Madden*, 15 Kans. 249. See *Wilson v. Watts*, 9 Md. 356.

³ *Lesley v. Johnson*, 41 Barb. (N. Y.) 359; *Smyth v. Munroe*, 84 N. Y. 354; *Eitel v. Bracken*, 38 N. Y. Superior Ct. 7. "It is a wise and just restriction, that if a mortgagor makes a false statement, orally or in writing, to influence the purchase of the security, he cannot take advantage of it as against an innocent purchaser. The law adjudges him to be estopped from profiting by his own fraud." Per Curtis, J.

⁴ *Eitel v. Bracken*, *supra*; *Van Sickle v. Palmer*, 2 T. & C. (N. Y.) 612; *Wilcox v. Howell*, 44 N. Y. 398.

⁵ *Eitel v. Bracken*, *supra*, per Curtis, J. "It is contrary to good morals, that a certificate containing an unadulterated falsehood, and known to both the maker and recipient to be simply such, should be sustained as sufficient to protect the latter in the purchase of a mortgage, because he believed it would so protect him as a matter of law, and would not have bought the mortgage without it."

A mortgage made to aid an officer in the settlement of his official accounts by making up a deficiency, and used for that purpose, cannot afterwards be repudiated by the maker as invalid. He cannot complain that after having accomplished its purpose by being used as evidence of a loan with his consent, it is held to be a valid obligation.¹ He is estopped, too, from denying the official character of the grantee, as a commissioner of the school fund, although the office had been abolished. The mortgage being intended as a security for the school fund, it will be given the effect intended by the parties, and the maker will not be allowed to deny its recitals.²

632. A mortgagor is not allowed to invalidate his own deed by showing that it was executed by him for the purpose of defrauding his creditors. A court of equity will not lend its aid to relieve the mortgagor from the consequences of his own fraudulent act, nor will it aid the mortgagee in securing him in the enjoyment of the property, where its interposition is necessary for that purpose. The mortgagee is left to his legal remedies, which will enable him, when invested with the legal title, to recover the possession of the mortgaged property. So far as the contract is executory, he is without remedy, either legal or equitable.³

A defence to the enforcement of a mortgage for the want of consideration cannot be met by evidence that the mortgage was given with a view to defraud the creditors of the mortgagor. "The general rule of policy is, *In pari delicto potior est conditio defendentis*. If there was an intent to defraud creditors, it was an intent common to both parties, affecting as well the plaintiff's intestate as the defendant. It is the plaintiff who is the actor, and is seeking to enforce the payment of these notes. It may well be held, that the defendant would not be permitted to show that the notes were made to delay and defeat creditors as a substantive ground of defence, on the well known maxim, *Nemo allegans suam turpitudinem audiendus sit*; and therefore if a legal consideration were shown, such a defence could not avail. But independently of this ground, he shows want of consideration, and it is the demandant who seeks to rebut that defence, by showing that the notes were given as well to defeat creditors as without consideration."⁴

¹ Floyd Co. v. Morrison, 40 Iowa, 188.

² Brookover v. Hurst, 1 Met. (Ky.) 665.

³ Floyd Co. v. Morrison, *supra*.

⁴ Wearse v. Peirce, 24 Pick. (Mass.)

PART II.

USURY.

1. *What Mortgages are Usurious.*

633. Usury laws apply to mortgages in the same manner that they apply to contracts in general, and the same principles of law are applicable to the inquiry, whether they are usurious or not. The subject of usury is of less importance now than it was formerly, for the reason that within a few years the usury laws have been repealed in several states, and in others they have been greatly modified, so that only in a few states does usury now invalidate a contract. A brief statement of the laws of the several states with reference to interest and usury is given in a note; but it is to be borne in mind that these laws are at present subject to frequent changes.¹ It appears that in the states of Maine,

¹ **Alabama:** Eight per cent. Usury forfeits interest, but not principal. The defendant recovers full costs. R. C. 1867, §§ 1827, 1831, 2781; *Ib.* 1876, §§ 2088-2092, 3130. **Arizona T.:** Ten per cent. when there is no express agreement, but the parties may contract in writing for any rate. Acts 1864, p. 46, §§ 1, 4; C. L. 1877, §§ 3450, 3451. **Arkansas:** Six per cent., but parties may contract for any rate not exceeding ten per cent. Usury renders the contract void both as to principal and interest. Const. 1874, art. 19, § 13. **California:** Seven per cent., but the parties may contract for any rate, simple or compound. Civ. C. §§ 1917-1920; 1 Codes & Stats. 1876, §§ 6917-6920; Amendments, 1877-8, p. 87. **Colorado:** Ten per cent., but parties may stipulate in writing for a higher rate. G. L. 1877, §§ 1366-1368. **Connecticut:** Six per cent. Payments in excess of that rate cannot be set off or recovered back. Acts 1875, p. 252. **Dakota T.:** Seven per cent., but parties may contract for a higher rate not exceeding twelve per cent. Usury forfeits all interest. C. 1877, §§ 1097-1102. But in the counties of Lawrence, Pennington, Custer, Mandan, and Forsythe, the rate is unlimited. Laws 1881, c. 31. **Delaware:** Six per cent. Usury forfeits a sum equal to the whole loan.

R. C. 1874, c. 63, § 1. **District of Columbia:** Six per cent. Parties may stipulate in writing for a rate not exceeding ten per cent. Usury forfeits a sum equal to the whole interest to be recovered within one year. R. S. D. C. 1875, §§ 713, 717. **Florida:** Eight per cent., but any rate may be agreed upon. Bush Dig. p. 368. **Georgia:** Seven per cent., but parties may contract in writing for any rate not exceeding eight per cent. Interest in excess is forfeited. C. 1873, §§ 2050, 2051; Acts 1875, p. 105. Acts 1879, p. 184. **Idaho T.:** Ten per cent. Parties may contract in writing for any rate not exceeding one and one half per cent. per month. Usury forfeits three times the interest paid, and incurs liability to fine of one hundred dollars, or six months' imprisonment, or both. Laws 1875, p. 7. **Illinois:** Six per cent., but parties may contract in writing for any rate not exceeding eight per cent. Usury forfeits the entire interest. Corporations cannot interpose this defence. R. S. 1874, and R. S. 1880, c. 74; Laws 1875, p. 85; Laws 1879, p. 184. **Indiana:** Six per cent., but parties may contract in writing for any rate not exceeding eight. Usury forfeits the excess. Acts 1879, p. 43. **Iowa:** Six per cent., but parties may agree in writing for a rate not exceeding ten.

Massachusetts, Rhode Island, South Carolina, Florida, California, Colorado, Nevada, and in the territories of Utah, Arizona, Mon-

Usury forfeits ten per cent. on the contract to the school fund, and only the principal can be recovered. C. 1873, and R. Code, 1880, §§ 2077, 2080. **Kansas**: Seven per cent., but parties may contract in writing for not exceeding twelve per cent. Payments in excess are accounted as payments on the principal. G. S. 1868, p. 525, 526, §§ 1, 3; *Dassler's St.* 1876, c. 51. **Kentucky**: Six per cent., but parties may contract in writing not exceeding eight per cent. Upon the death of a promisor in a contract for a higher rate than six per cent., or after judgment, the rate is six per cent. Usury forfeits the entire interest. G. S. 1873, c. 60, art. 1, 2. **Louisiana**: Five per cent. Eight per cent. may be stipulated, and a higher rate if embodied in the face of the obligation, or by way of discount; but no higher rate is lawful after maturity. Usury forfeits the entire interest. R. S. 1870, §§ 1883, 1890. **Maine**: Six per cent., but the parties may agree in writing for any rate. R. S. 1871, c. 45. See *Lindsay v. Hill*, 66 Me. 212. **Maryland**: Six per cent. Usury forfeits the excess. C. 1860, p. 696, R. Code, 1878, §§ 1-5. **Massachusetts**: Six per cent., but parties may contract in writing for any rate. G. S. 1860, c. 53, §§ 3-5; *Stat.* 1867, c. 56. **Michigan**: Seven per cent., but parties may contract in writing for not exceeding ten per cent. Usury forfeits the excess, but it cannot be recovered after a voluntary payment. A purchaser in good faith of negotiable paper is not affected by the usury. C. L. 1871, p. 540, §§ 2, 4, 5. **Minnesota**: Seven per cent. Parties may agree in writing upon any rate not exceeding ten per cent. A contract for more is usurious, and makes void all instruments except negotiable paper in the hands of *bonâ fide* purchasers. G. S. 1878, c. 23, §§ 61-4; *Laws* 1879, c. 66. **Mississippi**: Six per cent. Parties may contract in writing for any rate not exceeding ten per cent. Usury forfeits all interest. R. Code, 1880, c. 41. **Missouri**: Six per cent., but parties may contract in writing for any rate not exceeding ten.

Usury forfeits the interest at ten per cent. to the common schools. *Stats.* 1872, p. 782, §§ 1, 3, 5; R. S. 1879, c. 41, §§ 2723-2728. **Montana T.**: Ten per cent., but parties may stipulate for any rate. C. S. 1872, c. 33, §§ 1-3. **Nebraska**: Seven per cent., but parties may contract for a rate not exceeding ten, and this may be taken in advance. Usury forfeits all interest. *Laws* 1879, p. 113; *Compiled Stats.* 1881, p. 322. **Nevada**: Ten per cent., but parties may contract in writing for any other rate. C. L. 1873, §§ 32, 33. **New Hampshire**: Six per cent. Usury forfeits three times the excess. Principal and legal interest may be recovered. G. S. 1867, c. 213; *Acts* 1872, c. 12 § 3; G. L. 1878, c. 232, §§ 3, 4. **New Jersey**: Six per cent. Usury forfeits all interest. *Rev.* 1877, p. 519; *Laws* 1878, c. 26. **New Mexico T.**: Six per cent., in absence of a written agreement; G. *Laws*, 1880, c. 79. **New York**: Six per cent. Usury makes void the contract; but no corporation can plead the defence. It is also punishable with a fine of one thousand dollars, or six months' imprisonment, or both. Banks are exempt from these penalties. 2 R. S. 1875, p. 1164, §§ 1-20; *Laws* 1879, c. 538. **North Carolina**: Six per cent., but eight per cent. may be stipulated by contract in writing. Usury forfeits the entire interest, and twice the amount of interest paid may be recovered. *Laws* 1877, c. 91; *Kidder v. McIlhenny*, 81 N. C. 123. **Ohio**: Six per cent. Parties may contract in writing for not more than eight per cent. Judgments bear interest at rate of the contract. *Laws* 1869, p. 91. **Oregon**: Eight per cent., but parties may contract for ten per cent. Usury forfeits the debt. G. L. 1872, pp. 623, 624; *Laws* 1880, p. 17. **Pennsylvania**: Six per cent. Usurious interest cannot be collected, and, if paid, may be recovered by suit brought within six months. Negotiable paper, taken in good faith, is not affected by the discount. Obligations of railroad and canal companies not within the law. *Brightly's Purdon's Dig.* 1872, pp. 803, 804, §§ 1, 2,

tana, New Mexico, Wyoming, and Washington, there are no usury laws, and the parties may contract in writing for any rate of interest; that in Connecticut, Georgia, Indiana, Kansas, Maryland, Michigan, Minnesota, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and West Virginia, all that is left of former stringent provisions is a forfeiture merely of the usury above the legal interest; that in Alabama, Illinois, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, Virginia, Wisconsin, Dakota, and the District of Columbia, usury forfeits all interest; while in New York, Delaware, Arkansas, and Oregon, usury makes void the security. In Missouri, Iowa, Idaho, and North Carolina, usury either works a forfeiture of a fixed percentage or of twice or thrice the interest paid.

634. Intent to take usury.—A mortgage given to secure a just debt is neither invalid as against the mortgagor, nor fraudulent as against his creditors, because interest has been calculated upon the debt and included in the mortgage in excess of the strict legal right, or when no interest at all was collectible at law, if the allowance was just and equitable.¹

But if a mortgage be given to secure a preëxisting debt, which was tainted with usury, the mortgage will be vitiated by the usury of the original indebtedness.² A mortgage given in renewal of one that is tainted with usury is itself affected with the same

4. **Rhode Island**: Six per cent., but the parties may agree upon any rate. G. S. 1872, c. 128. **South Carolina**: Seven per cent. The parties may agree upon any rate. R. S. 1873, p. 292, §§ 5-6. **Tennessee**: Six per cent. Parties may contract in writing for not exceeding ten per cent. Interest above six per cent. cannot be recovered, or, if paid, may be recovered. Usury is also punishable by indictment and a fine of not less than one hundred dollars. Stat. 1871, §§ 1944, 1945, 1948; Act 1869, c. 69, § 1. **Texas**: Eight per cent. By contract twelve per cent. may be reserved. The excess is void. Dig. Laws, 1850, art. 1607, 1608, 1609; Const. 1875; R. S. 1879, arts. 2976-2980. **Utah T.**: Ten per cent. Parties may agree upon any rate. Laws 1868, c. 13, p. 15; Compiled Laws, 1876, p. 170. **Vermont**: Six per cent. Excess cannot be recovered, or, if paid, may be recovered back. R. L. 1880, §§ 1996-2000. **Virginia**:

Six per cent. Usury forfeits all interest, corporations excepted. Acts 1874, c. 122. **Washington T.**: Ten per cent., but any rate may be agreed upon. Stat. 1854, p. 380, §§ 1, 2. **West Virginia**: Six per cent. The excess cannot be recovered. Corporations excepted. C. 1870, c. 96, §§ 4, 6. **Wisconsin**: Seven per cent. Parties may contract in writing for ten per cent. Usury forfeits all interest; compound interest not computed unless expressly agreed upon in writing. Treble the excess over lawful rate is recoverable within a year. G. S. 1878, c. 79, §§ 1688-1692. **Wyoming T.**: Twelve per cent., but any rate may be agreed upon. C. L. 1876, c. 63, §§ 1, 2.

¹ *Spencer v. Ayrault*, 10 N. Y. 202.

² *Bell v. Lent*, 24 Wend. (N. Y.) 230; *Vickery v. Dickson*, 35 Barb. (N. Y.) 96; *Thompson v. Berry*, 3 Johns. (N. Y.) Ch. 395; S. C. 17 Johns. 436.

taint.¹ And the consequences of the usury will attend the new security, even when this is given by a third person, if there be no other consideration than the original usurious debt. But if the usurious mortgage be transferred to an innocent holder, and he receive directly from the mortgagor a new one in its stead, the latter cannot be impeached on account of the usury in the original mortgage.² There is no rule of law which makes it unlawful or usurious in one to loan money, to be used by the borrower in paying a usurious debt to another, if this loan be itself free from usury.³

Usury to affect a mortgage must relate directly to the mortgage debt. If a mortgage not affected by usury be assigned as collateral security for a debt of the mortgagee usury taken by the assignee on the latter debt cannot be set up as a defence to the mortgage.⁴

Inasmuch as usury depends upon the intent with which it is taken, the court will look into the whole transaction to determine what the intent was, not only into the acts of the parties at the time of the transaction, but subsequently.⁵

A stipulation for the payment of interest at the highest rate allowed by law, at periods shorter than a year, whether semi-annually or quarterly, does not make the loan usurious.⁶ Neither is the taking of interest at the highest rate allowed by law, in advance for a whole year, usurious.⁷

Equity will interfere, upon a proper application, to prevent the collection of usurious interest by the enforcement of a mortgage, when the debtor has paid or tendered all that either law or equity can require him to pay.⁸

A mortgage loan may be usurious in part and valid in part; as, for instance, when the mortgage covers several distinct loans, one of which was usurious in consequence of the payment of a bonus,

¹ *McCraney v. Alden*, 46 Barb. (N. Y.) 281; *Stelle v. Andrews*, 19 N. J. Eq. 409. 272; *S. C. sub nom. Cope v. Wheeler*, 41 N. Y. 303. See *Hoyt v. Bridgewater Copper Mining Co.* 6 N. J. Eq. (2 Halst.) 253, 625.

² *Kilner v. O'Brien*, 14 Hun (N. Y.), 414; *Sherwood v. Archer*, 10 Ib. 73; and see *Jenkins v. Levis*, 25 Kans. 479.

³ *Wilson v. Harvey*, 4 Lans. (N. Y.) 507.

⁴ *Stevens v. Reeves*, 33 N. J. Eq. 427.

⁵ *Bardwell v. Howe, Clarke* (N. Y.),

281; *Stelle v. Andrews*, 19 N. J. Eq. 409. See *Fox v. Lipe*, 24 Wend. (N. Y.) 164; *Guggenheimer v. Geisler*, 81 N. Y. 293; *Knickerbocker L. Ins. Co. v. Nelson*, 78 N. Y. 137; *White v. Lucas*, 46 Iowa, 319.

⁶ *Meyer v. City of Muscatine*, 1 Wall. 384; *Mowry v. Bishop*, 5 Paige (N. Y.), 98.

⁷ *Tholen v. Duffy*, 7 Kans. 405, and cases cited.

⁸ *Waite v. Ballou*, 19 Kans. 601.

but the other loans were not usurious. The forfeiture or penalty in such case will be confined to the usurious part only.¹

635. Attorney's fees. — A provision for the payment of damages to the amount of five or ten per cent. of the loan, in case of a sale for a breach of the condition, may not be usurious,² although on a mortgage for a large amount such a percentage would be unreasonable,³ and the court would allow only a reasonable sum to be collected.⁴ It is in effect only a stipulation to allow compensation for extra and incidental trouble and expense in consequence of the sale; and a provision for the payment of the expenses of foreclosure, and a reasonable attorney's fee, is generally held valid and not obnoxious to the usury laws.⁵ Whenever the stipulation is for the payment of something which the court can see is a valid and legitimate charge or expense, it will be upheld; but if the stipulation be so indefinite that the court cannot tell whether the payment was intended to be for something legal or illegal, it will not be upheld. Accordingly it has been held that a stipulation for the payment, in case of foreclosure, of the costs "and fifty dollars as liquidated damages for the foreclosure of the mortgage," is invalid.⁶ If this phrase was designed to cover attorney fees, if it was only designed to cover a legitimate charge or expense, why did the parties not say so? If the damages were for usurious interest, of course they could not be allowed.⁷

636. An agreement to pay the taxes on the mortgage debt in addition to interest has been held not to be usurious.⁸

637. Exchange. — When no place of payment is named in the mortgage, the debt is generally payable to the mortgagee wherever he may be found. If made payable at the place of residence of the mortgagor, for his accommodation, it is not

¹ *Mahn v. Hussey*, 28 N. J. Eq. 546.

² See § 359; *Siegel v. Drumm*, 21 La. Ann. 8; *Gambriel v. Doe*, 8 Blackf. (Ind.) 140; *Billingsley v. Dean*, 11 Ind. 331; *Huling v. Drexell*, 7 Watts (Pa.), 126; *Munter v. Linn*, 61 Ala. 492.

³ *Daly v. Maitland*, 88 Pa. St. 384; S. C. 13 West. Jur. 204.

⁴ *Munter v. Linn*, 61 Ala. 492.

⁵ *Weatherby v. Smith*, 30 Iowa, 131; S. C. 6 Am. Rep. 663; *Parham v. Pulliam*, 5 Cold. (Tenn.) 497; *Clawson v. Munson*, 55 Ill. 394. In *Kentucky*, however, it is

held that a provision for the payment of an attorney's fee upon foreclosure is against public policy, and also usurious in its nature, and cannot be enforced. *Thomasson v. Townsend*, 10 Bush, 114; *Rilling v. Thompson*, 12 Ib. 310.

⁶ *Foote v. Sprague*, 13 Kans. 155; *Tholen v. Duffy*, 7 Kans. 405.

⁷ *Foote v. Sprague*, *supra*, per Valentine, J.; and see *Kurtz v. Sponable*, 6 Kans. 395; *Tholen v. Duffy*, 7 Kans. 405.

⁸ *Banks v. McClellan*, 24 Md. 62.

usurious for him to allow the mortgagee the difference of exchange between the two places; unless it appear that this allowance was a mere device on the part of the mortgagee to evade the usury laws, and to obtain more than legal interest for the use of his money.¹

A mortgage given in the United States, at a time when gold was at a premium, in settlement of a debt due and payable in a foreign country where gold was the basis of the currency, is not usurious by reason of including the current premium on gold.²

638. A mortgage to a building and loan association is not usurious, when, under the articles of association, in addition to monthly payments of interest, the mortgagor is bound, both by the mortgage and as a member of the association, to pay certain fines and impositions.³ But when special privileges as regards the taking of usury are conferred upon such an association, a loan will not be held to be within its operation unless it strictly conforms with the terms of the law.⁴ But a loan by such an association to a person not a member of the association is not exempt from the provisions of the interest laws of the state where the contract is to be performed. If the borrower from such an association has signed no written articles of membership, and there are no recitals of membership in the note or mortgage, he is not estopped to deny such membership, and whether he is a member or not is a question to be determined like any other issue of fact.⁵

The appointment of a receiver of such an association, being equivalent to a dissolution of the corporation, the weekly dues

¹ *Williams v. Hance*, 7 Paige (N. Y.), 581.

² *Oliver v. Shoemaker*, 35 Mich. 464.

³ *Silver v. Barnes*, 6 Bing. N. C. 180; *Red Bank Mut. Build. & Loan Ass'n v. Patterson*, 17 N. J. Eq. 223; *Building Loan & Savings Ass'n v. Vanderveer*, 11 N. J. Eq. (3 Stockt.) 382, where reasons are stated; *Massey v. Citizens' Building Asso.* 22 Kans. 624; *Shannon v. Dunn*, 43 N. H. 194; *Citizens' Mut. Loan Assn. v. Webster*, 25 Barb. (N. Y.), 263; *Heckelkamperv. German Building Assn.* 22 Kans. 549; and see *Ocmulgee Build. & Loan Assn. v. Thomson*, 52 Ga. 427; *Hagerman v. Ohio Building Assn.* 25 Ohio St. 186. *Contra*, *Citizens' Security & Land Co. v. Uhler*, 48 Md. 455.

In *Pennsylvania* a building association

can recover on its mortgage only the money actually advanced to its stockholder, with legal interest. *Link v. Germantown Building Assn.* 89 Pa. St. 15.

As to statement of account between the association and mortgagor, see *Peter's Building Association v. Jaecksch*, 51 Md. 198; *McCahan v. Columbian Build. Assn.* 40 Md. 226.

⁴ *Birmingham v. Md. Land & Permanent Homestead Assn.* 45 Md. 541; *Wiliar v. Balt. Butchers' Loan & Annuity Assn.* Ib. 546.

⁵ *Building Association v. Thompson*, 19 Kans. 321. See, also, *Lincoln Building & Saving Assn. v. Graham*, 7 Neb. 173; *Wolbach v. Lehigh Building Association*, 84 Pa. St. 211; *Juniata Building & Loan Assn. v. Mixell*, 84 Pa. St. 313.

or instalments which a mortgagor has contracted to pay should be computed only down to the time of the appointment.¹

639 When there has been an absolute conveyance of land, with an agreement to repurchase within a fixed time, at a price exceeding that paid for it, and interest, the transaction may be a conditional sale, in which case it is not affected with usury. If, however, the transaction be a mortgage, it is usurious. As already noticed, such a transaction is closely observed by the courts in order to prevent the creditor from depriving the debtor of the right of redemption, which should attach to it as a mortgage. The transaction is, moreover, suspicious, for the reason that it easily affords a ready cloak for usury. It will not be sustained as a conditional sale, unless it clearly appears that it was in good faith intended as such, and not as a contrivance to cover usury.²

In a mortgage any agreement to pay more than the sum loaned and lawful interest is usury; and usury is constituted not only by the payment of money, but by any arrangement whereby the lender derives a profit or advantage beyond the interest allowed by law.³ Where the laws make usurious contracts void, any transaction which is in effect a mortgage, though called a sale by the parties, and is usurious in effect, is rendered invalid. The intent is deduced from the fact. If the mortgagee knowingly and voluntarily take or reserve a greater interest than is allowed by law, his security is thereby rendered void; though it is not if taken by mistake or accident. But aside from mistake or accident, evidence will not be allowed to show that the mortgagee did not intend to violate the statute.⁴

In whatever way the transaction may be disguised, if it be in fact a loan at a usurious rate of interest, the security taken will be declared void.⁵ The attempt is sometimes made to conceal usury under the guise of rent; as where a mortgage was given to secure a loan of \$3,000, without any agreement about interest; but the mortgagee leased the mortgaged premises to the mortgagor at an

¹ *Peter's Building Association v. Jaeksch*, 51 Md. 198; *Low Street Build. Asso. v. Zucker*, 48 Md. 449.

² *Gleason v. Burke*, 20 N. J. Eq. 300.

³ *Gleason v. Burke*, *supra*.

⁴ *Fiedler v. Darrin*, 50 N. Y. 437. "The plaintiff doubtless hoped and intended to cover up his tracks, to conceal his loan and the reservation of usurious interest, under the weak guise of a pur-

chase and resale, and could well have sworn that he did not intend to bring himself within the condemnation of the law. But he did in fact loan his money at an illegal interest, and has failed in his attempt to evade the consequences." Per Allen, J.

⁵ *Fitzsimons v. Baum*, 44 Pa. St. 32; *Birdsall v. Patterson*, 51 N. Y. 43; *Andrews v. Poe*, 30 Md. 486.

annual rent of \$270, which was held to be an agreement for usurious interest.¹

640. The grantor is not entitled to any of the penalties or forfeitures given by the statute for usury, even when it is shown that this form of the transaction was used for the purpose of covering up a usurious rate of interest agreed upon between the parties, although a court of equity will allow a debtor to redeem, when to secure a loan of money he has made an absolute conveyance of land and taken an agreement to repurchase. The debtor is entitled to a conveyance upon the payment of the original loan with legal interest; but having put the transaction into such a form that he is obliged to ask a court of equity for relief from the letter of the contract, which he could not obtain at law, the court will impose terms upon him to do equity.²

641. Sale of mortgage. — Although a valid mortgage once issued may be sold at a discount without involving the purchaser in any of the consequences of taking usurious interest,³ yet, if the mortgage be made without consideration and for the purpose of being sold, inasmuch as the subsequent sale gives it vitality, and is really the issuing of it, a sale at a discount has the same effect in rendering it void, as has the taking of a bonus by the mortgagee.⁴ It would seem, however, that one purchasing a mortgage at a discount of the mortgagor's agent, in whose name the mortgage stood, without knowledge of the agency, would not incur any liability for usury.

Where a vendor of land agreed to take a mortgage for a part of the purchase money, and in anticipation of the trade arranged to sell the mortgage at a discount, and merely to save the trouble of a transfer had the mortgage made directly to the purchaser of the mortgage, it was held the transaction was not usurious, the evidence showing that it was not a contrivance to evade the usury laws.⁵

On the other hand, a sale of mortgage securities at a premium by the mortgagee does not subject him to an action for the recovery of the premium on the ground of usury.⁶

¹ *Gordon v. Hobart*, 2 Story, 243.

² *Heacock v. Swartwout*, 28 Ill. 291.

³ *White v. Turner*, 1 Hun (N. Y.), 623; *Wyeth v. Branif*, 14 Hun (N. Y.), 537; *Dowe v. Schutt*, 2 Den. (N. Y.) 621; *Lovett v. Dimond*, 4 Edw. (N. Y.) 22; *Mix v. Madison Ins. Co.* 11 Ind. 117.

⁴ *Vickery v. Dickson*, 62 Barb. (N. Y.) 272; and see *Walter v. Lind*, 16 N. J. Eq. 445; *Brooks v. Avery*, 4 N. Y. 225; *Sickles v. Flanagan*, 79 N. Y. 224. See *Culver v. Bigelow*, 43 Vt. 249.

⁵ *Armstrong v. Freeman*, 9 Neb. 11.

⁶ *Culver v. Bigelow*, *supra*.

642. If the agent of the mortgagee, in making the loan, exact a payment to himself by way of commission for making the loan, the loan is not necessarily rendered usurious.¹ The brokerage in excess of legal interest cannot affect the principal, when it is paid without his knowledge and he derives no benefit from it.² It has been attempted, however, to establish the rule, that such brokerage makes the mortgage usurious, unless it be taken by virtue of an independent agreement between the borrower and the broker. If, for instance, the borrower pays to the broker a premium in excess of legal interest, though the latter had been instructed by his principal to loan at lawful interest, and no part of the premium was received by the lender, but the borrower has no knowledge that it is all retained by the agent, the loan is considered usurious.³ But the latest and best considered decisions affirm the rule as first stated.⁴ These decisions are based upon the principle that the lender did not, either expressly or impliedly, authorize the agent to do an illegal act; and therefore the wrongful act of the agent in extorting a bonus for himself does not affect the lender so long as he does not participate in the extortion or in the results of it, but seeks to enforce the security for the precise amount he loaned with lawful interest.

Upon the same principle a bonus received by one trustee in making a loan upon a mortgage for a trust estate does not avoid the mortgage, if it appears that the bonus was taken without the authority or knowledge of the other trustees.⁵

If an attorney take a mortgage in his own name for a client and receive from the mortgagor a sum of money as compensation for examining the title to the premises, the transaction is not thereby made usurious.⁶

On the other hand, it is held that the declarations of an agent of the mortgagor, to whom a mortgage has been made for the purpose of enabling him to borrow money for the mortgagor, that

¹ *Van Wyck v. Watters*, 81 N. Y. 352; *Guggenheimer v. Griszler*, 81 N. Y. 293; *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 N. Y. 165; *Wyeth v. Braniff*, 14 Hun (N. Y.), 537; *Eslava v. Crampton*, 61 Ala. 507; *Phillips v. Roberts*, 90 Ill. 492; *Jennings v. Hunt*, 6 Bradw. (Ill.) 523.

² *Gray v. Van Blarcom*, 29 N. J. Eq. 454; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Muir v. Newark Savings Inst.* 16 N. J. Eq. 537; *Spring v. Reed*, 28 N. J. Eq. 345; *Manning v. Young*, Ib. 568.

³ *Estevez v. Purdy*, 6 Hun (N. Y.), 46; *Tiedemann v. Ackerman*, 16 Ib. 307; and see *Algur v. Gardner*, 54 N. Y. 360. The doctrine of these cases is criticised in *Gray v. Van Blarcom*, *supra*.

⁴ *Estevez v. Purdy*, 66 N. Y. 446, and cases cited above.

⁵ *Van Wyck v. Walters*, 16 Hun. (N. Y.), 209; *Stout v. Rider*, 12 Ib. 574.

⁶ *Dayton v. Moore*, 30 N. J. Eq. 543.

he owned the mortgage, and that it was given upon a previously existing indebtedness to him, if false and unauthorized, are not binding upon the mortgagor, and do not estop him to deny them and set up the defence of usury.¹

643. The burden of proof that the mortgage is usurious is upon the mortgagor. He is impeaching his own obligation formally executed under seal, and must establish the facts to constitute usury beyond a reasonable doubt. An even balance of testimony is not sufficient; there must be a clear preponderance. It is a defence not favored in equity; and especially when the consequence is to forfeit the whole debt, the defence is considered unconscientious.² When the penalty is a forfeiture of the illegal interest, or of all interest, even although the defence is not considered unconscientious, the rule of evidence, that the defence must be clearly made out, is applied both at law and in equity.³

There is a distinction between the rights of a mortgagor when defending on the ground of usury and his rights when he applies to a court of equity for relief against a usurious contract; for while in the former case he may avail himself fully of the statute, in the latter case he must do equity before he can obtain equity, and must pay the debt with legal interest.⁴

In a mortgage for purchase money, the fact that the sum secured is greater than that named in the consideration of the conveyance to the mortgagor, with interest, is no evidence that the difference is usury.⁵

When, at the time of an agreement for a mortgage loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute; and to increase or alter it, a special agreement is necessary; and if the defence of usury is interposed, the burden of showing that such an agreement was made is upon the mortgagor. Therefore where a mortgagor by the terms of his agreement was to pay the attorney's fees, and one item of the attorney's bill was a commission for obtaining the loan, and there was no foundation for the charge, which was intended for the benefit of the mortgagee, and was in fact retained by him, against the objection of the mortgagor, it was held that these facts did not sustain a defence of usury, as there was no agreement or in-

¹ New York Life Ins. & Trust Co. v. Beebe, 7 N. Y. 364.

² Conover v. Van Mater, *supra*.

³ Conover v. Van Mater, 18 N. J. Eq. 481.

⁴ Clark v. Finlon, 90 Ill. 245; Tooke v. Newman, 75 Ill. 215.

⁵ Vesey v. Ockington, 16 N. H. 479.

tent on the part of the mortgagor to pay usury, and he was, in fact, entitled to recover the amount retained by the mortgagee.¹

644. It has sometimes been held that the defence of usury is so exclusively personal, that it cannot be made by any one but the mortgagor or his privies in blood, estate, or contract; and that a subsequent incumbrancer or purchaser cannot set it up;² nor a surety avail himself of usury paid by his principal.³ But the doctrine more generally adopted is that not only the mortgagor, but any person who is seised of his estate and vested with his rights, unless he has assumed the payment of the mortgage, may interpose this defence, although a mere stranger cannot.⁴ Thus, a voluntary assignee of the mortgagor for the payment of his debts may set up usury in the mortgage.⁵ So may a judgment or execution creditor of the mortgagor;⁶ or a purchaser of the equity of redemption,⁷ unless he has assumed the payment of the mortgage, or bought subject to it,⁸ or a junior mortgagee.⁹ Any

¹ *Guggenheimer v. Geissler*, 81 N. Y. 293.

² *Ready v. Huebner*, 46 Wis. 692; *Bensley v. Homier*, 42 Wis. 631; *Darst v. Bates*, 95 Ill. 493; *Baskins v. Calhoun*, 45 Ala. 582; *Fenno v. Sayre*, 3 Ala. 458; *McGuire v. Van Pelt*, 55 Ala. 344; nor by mortgagor's wife claiming under a subsequent voluntary conveyance. *Cain v. Gimon*, 36 Ala. 168.

In *Ready v. Huebner*, *supra*, *Cole, J.*, says: "It is true there is a class of cases which hold that the purchaser generally — not of the mere equity of redemption — of property charged with an usurious lien or claim can allege the usury, and defeat the claim when the conveyance shows that the vendor conveyed the property discharged of such lien. *Newman v. Kershaw*, 10 Wis. 333; *Ludington v. Harris*, 21 Ib. 240; *Hartley v. Harrison*, 24 N. Y. 170, 176; *Bullard v. Raynor*, 30 Ib. 197; *Chamberlain v. Dempsey*, 36 N. Y. 144-149; *Williams v. Tilt*, Ib. 319. The reason given in some of these cases for such a ruling is, that the purchaser, under such circumstances, succeeds to all the relations of his vendor in respect to the property, and therefore necessarily acquires the right to question the validity of the usurious security in protection of his title."

³ *Lamoille County Nat. Bank v. Bingham*, 50 Vt. 105.

⁴ *Brolasky v. Miller*, 9 N. J. Eq. (1 Stockt.) 807; *Westerfield v. Bried*, 26 N. J. Eq. 357.

⁵ *Pearsall v. Kingsland*, 3 Edw. (N. Y.) 195.

⁶ *Carow v. Kelly*, 59 Barb. (N. Y.) 239; *Thompson v. Van Vechten*, 27 N. Y. 568; *Dix v. Van Wyck*, 2 Hill (N. Y.), 522.

⁷ § 746; *Green v. Kemp*, 13 Mass. 515; *Bridge v. Hubbard*, 15 Mass. 96, 103; *Gunnison v. Gregg*, 20 N. H. 100; *Shufelt v. Shufelt*, 9 Paige (N. Y.), 137, 145; *Brooks v. Avery*, 4 N. Y. 225; *Berdan v. Sedgwick*, 44 N. Y. 626; *Bullard v. Raynor*, 30 N. Y. 197, 202; *Banks v. McClellan*, 24 Md. 62; *M'Alister v. Jerman*, 32 Miss. 142; *Doub v. Barnes*, 1 Md. Ch. 127; *Maher v. Lanfrom*, 86 Ill. 513.

⁸ §§ 744, 745, 1494. See *Sands v. Church*, 6 N. Y. 347; *Ferris v. Crawford*, 2 Denio (N. Y.), 595, 598; *Stephens v. Muir*, 8 Ind. 352; *Wright v. Bundy*, 11 Ind. 398.

⁹ *Greene v. Tyler*, 39 Pa. St. 361; *Waterman v. Curtis*, 26 Conn. 241. *Contra*, *Powell v. Hunt*, 11 Iowa, 430; *Union Dime Savings Inst. v. Clark*, 59 How. (N. Y.) Pr. 342.

one in legal privity with the mortgagor, unless he has debarred himself of the right to dispute the mortgage, may set up this defence; otherwise the property would be practically inalienable in the hands of the mortgagor, unless he should be willing to affirm the usurious mortgage by selling the property subject to it. But the owner of the property has, of course, the right to sell the property as though such void mortgage did not exist; and the purchaser necessarily acquires all the rights of his vendor to question the validity of the usurious incumbrance.¹

A mortgagor may waive the usury, and then those holding cannot avail themselves of this defence. Moreover, any one claiming under the mortgagor and in privity with him may remove the taint of usury as to both himself and those deriving title from him.² A conveyance by the mortgagor subject to an existing mortgage imports a waiver, and his grantee cannot set up usury. But a sheriff selling the mortgaged land on execution, or on foreclosure, does not, by conveying subject to a prior mortgage, deprive the purchaser of the right to set up the defence, for he has no power to waive the usury.³

A part payment of the mortgage debt under an agreement with the mortgagee, whereby part of the mortgaged land is released, is not a waiver of usury in the mortgage.⁴

645. A mortgagor may be estopped from setting up usury by reason of having executed, after the making of the mortgage, a covenant or certificate under seal that the mortgage was a valid and subsisting lien upon the premises described, unless an innocent third party is thereby induced to buy the mortgage, relying upon the statement. As against the mortgagee himself, or any assignee who knew the fact of usury, it is without effect.

If a purchaser has notice of the usurious character of the instrument, he is not protected by such a certificate, although he relied upon it as a protection in law.⁵ The mortgagor may introduce evidence to show that the purchaser never believed, nor

¹ Per Chancellor Walworth, in *Shufelt v. Shufelt*, *supra*.

² *Warwick v. Dawes*, 26 N. J. Eq. 548.

³ *Pinnell v. Boyd*, 33 N. J. Eq. 600.

⁴ *Latrobe v. Hulbert* (C. C. Ohio, 1881), 6 Fed. Rep. 209.

⁵ *Wilcox v. Howell*, 44 N. Y. 398; *Eitel v. Bracken*, 38 N. Y. Superior Court, 7. In the former case the court,

per Earl, C., said that the doctrine of equitable estoppel, being founded upon principles of equity and justice, is only applied to conclude a party by his acts and admissions, when in good conscience he ought not to be permitted to gainsay them; and that it would be preposterous to hold that a party is estopped from claiming that the very instrument supposed to estop him was obtained by fraud.

acted upon, the statements as true. He may show that the mortgagee shared in a very large fee paid his attorneys in the matter of the loan, and that it was really a cover for usury.¹

A mortgagor is also estopped from setting up usury in a mortgage as against one whom he has induced to purchase it.²

646. Usury set up after a foreclosure and sale. — Under usury laws which make void securities affected with usury, the question arises, What limit is there to the effect of the statute? Does a foreclosure of the mortgage and a sale of the mortgaged property to a third person terminate the right of the mortgagor to avail himself of the usury, or do the consequences of it still attend the property so that the purchaser's title may be rendered void? If the effect of the usury survives the original transaction, in the words of Lord Kenyon,³ "it might affect the most of the securities in the kingdom; for if, in tracing a mortgage for a century past, it could be discovered that usury had been committed in any part of the transaction, though between other parties, the consequence would be that the whole would be void. It would be a most alarming proposition to the holders of all securities." This question was also answered by an early case in New York, in which Chief Justice Kent, delivering the opinion of the court, said: "The principles of public policy, and the security of titles, are deeply concerned in the protection of such a purchaser. If the purchase was to be defeated by the usury in the original contract, it would be difficult to set bounds to the mischief of the precedent, or to say in what sequel of transactions, or through what course of successive alienations, and for what time short of that in the statute of limitations, the antecedent defect was to be deemed cured or overlooked, so as to give quiet to the title of the *bonâ fide* purchaser. The inconvenience to title would be alarming and enormous. The law has always had a regard to derivative titles, when fairly procured; and though it may be true, as an abstract principle, that a derivative title cannot be better than that from which it was derived, yet there are many necessary exceptions to the operation of this principle."⁴

After a foreclosure, a mortgage contract is regarded as executed. So long as the contract remains executory, the mortgagor can avail himself of the usury; but when it is executed, and

¹ Van Sickle v. Palmer, 2 Thomp. & C. (N. Y.) 612.

² Cuthbert v. Haley, 8 T. R. 390.

³ Jackson v. Henry, 10 Johns. (N. Y.)

⁴ Barnett v. Zacharias, 24 Hun (N. Y.), 304.

185, 197; and see Elliott v. Wood, 53 Barb. (N. Y.) 285.

others have in good faith acquired interests in the property, the objection can no longer be raised. But if the mortgagee himself buy the property directly or through an agent at the foreclosure sale, it is held that his title may still be impeached for usury in the mortgage. Being a party to the usurious contract, his situation is no better after the foreclosure than it was before.¹

647. A bonus paid to secure the extension of the time of payment of an existing mortgage does not invalidate the mortgage as a security for the original debt, but the amount paid should be applied as a payment on the mortgage debt.² When a mortgage is free from usury in its inception, no subsequent usurious contract in relation to it can affect the mortgage itself. It is only the subsequent contract that is affected by the usury. The mortgage, not being usurious in its origin, is not made so retrospectively by the receipt of usurious interest under an agreement to forbear demand of payment; though the penalty of the statute may be incurred.³ A provision of the *lex loci contractus* rendering void the original contract when extra interest is taken for the forbearance of the payment of money when due will not be enforced in a foreign state, because the forfeiture is in the nature of a remedy. The *lex fori* determines the remedy; the *lex loci contractus* the validity and construction.⁴

An agreement after maturity of the mortgage debt to pay a rate of interest higher than is allowed by law, as an indemnity to the mortgagee for interest paid by him on money borrowed in another state at such higher rate, will not for that reason be upheld.⁵

648. A payment made by a mortgagor as a premium for an extension of the time of payment of the principal debt, being void for the purpose for which it was made, should be

¹ Jackson v. Dominick, 14 Johns. (N. Y.) 435; and see McLaughlin v. Cosgrove, 99 Mass. 4. So with any purchaser who has notice of the usury at the time of sale. Bissell v. Kellogg, 60 Barb. (N. Y.) 617; S. C. 65 N. Y. 432. But in New Jersey it is held that a subsequent mortgagee may set up usury under his petition for the surplus money remaining in court after satisfying prior mortgagees. Hutchinson v. Abbott, 33 J. Eq. 379.

² Terhune v. Taylor, 27 N. J. Eq. 80;

Real Estate Trust Co. v. Keech, 7 Hun (N. Y.), 253, and cases cited; Abrahams v. Claussen, 52 How. (N. Y.) Pr. 241; Langdon v. Gray, Ib. 387; Donnington v. Meeker, 11 N. J. Eq. (3 Stockt.) 362; Trusdell v. Jones, 23 N. J. Eq. 121; S. C. Ib. 554.

³ Thompson v. Woodbridge, 8 Mass. 256; Lindsay v. Hill, 66 Me. 212; Hawhe v. Snyderaker, 86 Ill. 197.

⁴ Lindsay v. Hill, *supra*.

⁵ Esalava v. Lepretre, 21 Ala. 504.

credited as a payment upon the mortgage debt as of the time when it was made.¹

649. Under some usury laws an agreement to extend the time of payment of a mortgage is void, if made in consideration of a usurious payment or contract.² But while the cases are in harmony upon this point, they are not agreed whether it is the privilege of the borrower alone to take advantage of the usurious taint of the contract; or whether, for instance, the lender may disregard the contract and proceed before the expiration of such extension to enforce payment or foreclose the mortgage. On the one hand, it is held that the lender cannot wilfully violate the statute against usury, and then take advantage of his own wrong by repudiating the contract; that the borrower or his surety, or personal representative, can alone set up the usury; in other words, that the victim of the usury, and not the usurer, can take advantage of the statute.³ But even if an extension made upon a usurious payment be binding at the election of the mortgagor, if upon a foreclosure suit he requires that the premium paid shall be credited, he disaffirms the contract for extension.⁴ He is entitled to the credit, but having received that he is not entitled to the extension, so as to prevent the whole principal from being regarded as due.

A distinction has been taken between a contract for extension founded upon a consideration of an actual payment of money made at the time of the contract, and one made upon an executory contract to pay usury; and it is held, that while the contract is binding upon the creditor in the former case, it is not binding in the latter; as, for instance, when the consideration for the extension is a promissory note of the debtor.⁵

Extension of the time of payment is a sufficient consideration for an agreement to increase the rate of interest upon the debt, and when the arrangement has once been entered upon without a definite limitation of its continuance being agreed upon, it will be presumed that the increased rate of interest continues as long as the forbearance is granted.⁶

¹ *Laing v. Martin*, 26 N. J. Eq. 93; *Trusdell v. Jones*, 23 Ib. 121; S. C. 554; *Nightingale v. Meginnis*, 34 N. J. L. 461; *Patterson v. Clark*, 28 Ga. 526. See, also, *Church v. Maloy*, 70 N. Y. 63.

² *Church v. Maloy*, *supra*.

³ *Billington v. Wagoner*, 33 N. Y. 31; *La Farge v. Herter*, 9 N. Y. 241. See, however, *Church v. Maloy*, *supra*.

⁴ *Church v. Maloy*, *supra*.

⁵ *Billington v. Wagoner*, 33 N. Y. 31; *Jones v. Trusdell*, 23 N. J. Eq. 554, per Chief Justice Beasley. See, however, *Church v. Maloy*, *supra*.

⁶ *Haggerty v. Allaire Works*, 5 Sandf. (N. Y.) 230.

But, on the other hand, the rule has sometimes been declared to be, that the court will not help either party to enforce a usurious contract while it remains executory.¹ A promise to extend the time of payment of a mortgage made in consideration of a note for a usurious premium is void; and the mortgagee may foreclose it before the expiration of the extended time upon his giving up the usurious note. The usurious contract in such case remains executory. It is not the privilege of the borrower alone to take advantage of the usurious taint. The statute makes the contract void.²

2. *Compound Interest.*

650. As to compound interest the general rule is that an executory contract for it cannot be enforced; but that the payment of such interest by the debtor, understandingly and under no peculiar circumstances of oppression, does not constitute usury.³ It is admitted that there is no law prohibiting such a contract: but the courts have adopted the rule from notions of policy;⁴ holding that although it may be demanded and recovered as it becomes due, an agreement to pay interest on the interest after it becomes due cannot be enforced.⁵ Lord Thurlow said:⁶ "My opinion is in favor of interest upon interest; because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary; and I must overturn all the proceedings of the court if I give it." Lord Eldon also said that a bargain for interest on interest was neither unfair nor illegal, but that it could not be allowed because it tended to usury, although it was not usury.⁷

In several states it is now provided by statute that interest upon interest may be contracted for;⁸ and it would seem that,

¹ Jones v. Trusdell, 23 N. J. Eq. 554; (N. Y.) 13; Van Benschooten v. Lawson, S. C. Ib. 121. 6 Ib. 313; Stewart v. Petree, 55 N. Y.

² Jones v. Trusdell, 23 N. J. Eq. 554; 621; Article in 16 Alb. L. J. 252.
S. C. Ib. 121.

³ Culver v. Bigelow, 43 Vt. 249.

⁴ For numerous authorities in support of the rule that interest shall not bear interest, except by virtue of an agreement made after the interest has become due, see Force v. City of Elizabeth, 28 N. J. Eq. 403, note.

⁵ Connecticut v. Jackson, 1 Johns. Ch.

⁶ In Waring v. Cunliffe, 1 Ves. Jun. 99.

⁷ Chambers v. Goldwin, 9 Ves. 254, 271. See, also, Blackburn v. Warwick, 2 Y. & C. 92, per Alderson, B.; Barnard v. Young, 17 Ves. 44, 47; Leigh v. Irvine, 1 Myl. & K. 277, 284; Thornhill v. Evans, 2 Atk. 330.

⁸ In Michigan it is provided that when

inasmuch as the objection to such contracts has been that they savored of usury, and inasmuch as it has always been held that the parties may, by a new agreement after the interest has accrued, turn it into principal, in those states where the laws against usury have been abolished, there can be no reason why an agreement for turning interest into principal is not valid. But in Nevada, although it is provided by statute that parties may agree in writing for the payment of any rate of interest, it is held in equity that a contract for compound interest cannot be enforced.¹ The court say, that "when the Nevada statute was passed, it was the settled rule of courts of equity to refuse to allow compound interest, when their aid was invoked to collect a debt. In courts of law the rule was not so well settled, but we think a majority of the States of this Union, and the English courts of

any instalment of interest upon any note, bond, mortgage, or other written contract shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such instalment so due and unpaid, from the time at which it became due, at the same rate as specified in any such note, bond, mortgage, or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per centum per annum. Com. Laws, 1871, § 1637.

Minnesota: Interest cannot be compounded; but a contract to pay interest not usurious upon interest overdue, is not construed to be usury. Laws 1877, c. 15; Laws 1879, c. 66.

In **Missouri** parties may contract in writing for the payment of interest upon interest; but the interest shall not be computed oftener than once in a year. Where a different rate is not expressed, interest upon interest is at the same rate as interest on the principal debt. Wag. Stat. 1870, p. 783, § 6; R. S. 1879, c. 41, § 2728; *Waples v. Jones*, 62 Mo. 440.

In **California** the parties may contract in writing, and agree that if the interest is not punctually paid it shall become part of the principal and bear interest at the same rate. Civil Code, 1873, § 1919.

In **Wisconsin** it is provided that interest shall not be compounded, or bear interest upon interest, unless there be an agree-

ment to that effect, expressed in writing, and signed by the party to be charged therewith. Stat. 1871, p. 840, § 10.

Arizona: Parties may, in any contract in writing whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt. Compiled Laws, 1877, § 3452.

On the other hand, express provisions against compound interest have been made in a few states.

Arkansas: In no case where a payment shall fall short of paying the interest due at the time of making such payment shall the balance of such interest be added to the principal. Stats. 1858, p. 623, § 11.

In **Louisiana** interest upon interest cannot be recovered, unless it be added to the principal, and by another contract made a new debt. No stipulation to that effect in the original contract is valid. Rev. Civil Code, 1870, art. 1939.

In **Idaho** no person or corporation, in computing interest on any bond, bill, promissory note, or any other instrument in writing, shall add the interest, or any portion thereof due, to the principal, and compute interest thereon as part of the principal, thereby charging compound interest. Rev. Law, 1875, p. 647, § 6; Laws 1879, p. 7.

¹ *Cox v. Smith*, 1 Nev. 161. Questionable.

law, had refused to enforce that portion of contracts which provided for the collection of compound interest. None of these rulings were founded on the statutes against usury, but on the general principles of the common law, as it existed without reference to the usury law."

In states where all usury laws have been abolished it would seem that a stipulation for the payment of compound interest is valid and may be enforced.¹

651. So long as the agreement for compound interest is executory merely the courts will not lend their aid to enforce it; but when the contract has been acted upon by the parties, and such interest has been paid, the courts will not require a repayment, nor will they hold the transaction to be in any degree tainted with usury, by reason of such payment. Such an agreement does not render a mortgage usurious, but the contract, so far as it provided for usurious interest, is void; but it may be enforced for the debt and interest, even where usury makes void the contract.² An agreement to pay interest on interest, made after the interest has accrued, is valid and may be enforced.³

Some recent decisions do away with this distinction, and hold that there is no objection to a contract for interest upon interest.⁴

In Ohio and Iowa it is the settled rule, that when interest is payable by the terms of a mortgage at stated periods, without any special agreement to that effect, it becomes principal from the time of payment, and may be recovered as such, with interest from the time it became due. Upon a note which simply provides for the payment of interest annually, the interest on the interest will be computed at the legal rate provided for cases where the parties do not agree upon a higher rate; and although the interest upon the note be fixed at a higher rate, in the absence of any agreement as to the rate of interest upon accrued interest that rate will not govern.⁵ Where interest upon a mortgage note was payable annually, interest upon the delinquent interest was allowed, although the note was made in New York and was payable there, where the rule was otherwise.⁶

¹ *Clarkson v. Henderson*, L. R. 14 Ch. D. 348.

⁴ *Hollingsworth v. City of Detroit*, 3 McLean, 472; *Scott v. Saffold*, 37 Ga.

² *Mowry v. Bishop*, 5 Paige (N. Y.), 98.

384.

³ *Tylee v. Yates*, 3 Barb. (N. Y.) 222; *Fobes v. Cantfield*, 3 Ohio, 17, 18; *Pauling v. Creagh*, 54 Ala. 646; *Force v. City of Elizabeth*, 28 N. J. Eq. 403, nota.

⁵ *Cramer v. Lepper*, 26 Ohio St. 59; S. C. 20 Am. R. 756. *Mann v. Cross*, 9 Iowa, 327.

⁶ *Preston v. Walker*, 26 Iowa, 205; *Burrows v. Stryker*, 47 Iowa, 477.

But when interest on interest is stipulated for, the rate reserved by mortgage, if within the limits allowed by law, will control.¹

652. Accrued interest is a debt; and even where an agreement made at the time of the loan for converting interest into principal, from time to time as it shall become due, is not allowed, because it is regarded as offensive and usurious, yet when it has become due, there is no objection to the parties converting such interest into principal, and securing it by a further mortgage. It is regarded as in the nature of a further advance, and not only may it form the consideration of a second or further mortgage, but as between the parties it may be tacked to the first mortgage.² If interest be demanded when due, it legally bears interest from that time; or if no demand be proved, then from the commencement of suit.³

When a mortgage is given to secure the payment of money in instalments, to commence at a future day, "with interest semi-annually," interest begins to run from the making of the contract. The holder may sue for each half year's interest as it becomes due, although the principal is not due.⁴

653. Interest coupons.⁵—It is the general practice for corporations, in making mortgages upon their property, to attach to the mortgage bonds coupons representing the interest payable at the several times when the interest falls due;⁶ and this practice has been adopted in several states quite extensively by individuals, in making ordinary mortgages or trust deeds upon their private property. Such coupons for the payment of definite sums of money at specified times are in effect promissory notes, and are held to draw interest in the same manner after maturity.

Interest coupons, although detached from the bond, are still

¹ *Watkinson v. Root*, 4 Ohio, 373; *Pr. 126*; *Stewart v. Petree*, 55 N. Y. 621; *Dunlap v. Wiseman*, 2 Disney (Ohio), 398. *Force v. City of Elizabeth*, 28 N. J. Eq. 403, 406, where authorities are collected in note; *Meyer v. Graeber* 19 Kans. 165.

² *Quimby v. Cook*, 10 Allen (Mass.), 32; *Wilcox v. Howland*, 23 Pick. (Mass.) 167; *Pinckard v. Ponder*, 6 Ga. 253; *Article in 16 Alb. L. J. 252.*

Townsend v. Corning, 1 Barb. (N. Y.) 627; *Williams v. Hance*, 7 Paige (N. Y.), 581; *Eslava v. Lepretre*, 21 Ala. 504; *Conners v. Holland*, 113 Mass. 50; *Hastings v. Wiswall*, 8 Mass. 455.

³ See *Jones on Railroad Securities*, §§ 317-340.

⁴ *Harper v. Ely*, 70 Ill. 581; *Hollingsworth v. City of Detroit*, 3 McLean, 472; *Gelpecke v. City of Dubuque*, 1 Wall. 175, 206; *Dunlap v. Wiseman*, 2 Disney (Ohio), 398; *Columbia Co. v. King*, 13 Fla. 451.

⁵ *Howard v. Farley*, 19 Abb. (N. Y.)

covered by the lien of the mortgage given to secure the bond.¹ Such coupons are usually payable to bearer, and may be transferred and presented by any holder.²

654. A provision for the payment of interest annually, and that if not so paid it shall be compounded, is no waiver of the right to enforce payment when due; and if the deed further provides that upon a failure to pay the debt or interest as it matures, the whole shall become due and payable, upon a failure to pay the interest annually the whole debt or the interest only may be enforced at the creditor's election.³

655. Computation of interest. — When no payments have been made upon the mortgage, the interest should be computed from the date of the note until the rendition of the decree. It is erroneous to compute the interest to the time of maturity, and adding it to the principal, then to compute it upon the gross amount to the time of rendering the decree.⁴

In computing interest upon a note with interest payable annually, intermediate payments made on account of the interest accruing, but not yet due, should be deducted at the end of the year, without any allowance of interest upon them; but rests should not be made at the time of such intermediate payments, as that would result in giving compound interest upon the loan.⁵

8. *Conflict of Laws.*

656. The general rule undoubtedly is, that the law of the place where the contract is executed governs as to the construction and validity of it; but there is this well recognized exception to the rule, or qualification of it, that where the contract is to be performed in another place, then the law of the place of performance will govern.⁶ When the mortgage debt is by its terms made payable in the state where the land is situated, though the mortgage was executed in another state, the contract, so far as it is personal, is to be interpreted by the laws of the place of performance.⁷ But the place where the mortgage

¹ *Miller v. Rutland & Washington R. Co.* 40 Vt. 399.

² *Sewall v. Brainerd*, 38 Vt. 364.

³ *Waples v. Jones*, 62 Mo. 440.

⁴ *Barker v. International Bank*, 80 Ill. 96. See, also, *Leonard v. Villars*, 23 Ill. 377.

⁵ *Townsend v. Riley*, 46 N. H. 300.

⁶ *Morgan v. New Orleans, Mobile & Tex. R. R. Co.* 2 Woods, 244; *Junction R. R. Co. v. Bank of Ashland*, 12 Wall. 226; *Little v. Riley*, 43 N. H. 109; *Parham v. Pulliam*, 5 Cold. (Tenn.) 497; *Lindsay v. Hill*, 66 Me. 212.

⁷ *Duncan v. Helm*, 22 La. Ann. 418.

is made payable may be different from the place where the land is situated; and the mortgage may have been executed in still a third place, and the question arises, By what law is the mortgage then to be governed? "Obligations, in respect to the mode of their solemnization," says Mr. Wharton,¹ "are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law." Mr. Justice Hunt, in a recent case before the Supreme Court of the United States, after quoting the rule as above laid down, himself states it as follows:² "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

657. What law governs. — The validity of a contract secured by mortgage made in one state, upon lands in another state, depends, so far as the usury laws affect it, upon the question, By the law of which state is the contract itself governed? If the loan is to be repaid in the state where it is made, the contract will be governed by the laws of that state, even when secured by mortgage of land situate in another state.³ If nothing be said about the place of payment, the contract is presumably payable where the parties reside and the contract is made, although the land be situated in another state; and the validity of the contract would be determined by the laws of the place of contract.⁴ If no place of payment be named and the mortgagee reside in the state in which the land lies, and the mortgage is there delivered and

¹ Conflict of Laws, § 401 p.

² Scudder v. Union Nat. Bank, 91 U. S. 406.

³ 3 Kent's Com. 460; Story's Conflict of Laws, §§ 287, 292, 293; Cope v. Wheeler, 41 N. Y. 303; S. C. 53 Barb. 350; 46 Ib. 272; Newman v. Kershaw, 10 Wis. 333; Kennedy v. Knight, 21 Wis. 340; Mills v. Wilson, 88 Pa. St. 118.

⁴ Cope v. Alden, 53 Barb. (N. Y.) 350;

aff'd 41 N. Y. 303; the action was for surplus money. And see Reimsdyk v. Kane, 1 Gall. 371, 374; Fitch v. Remer, 1 Flippin, 15; Williams v. Ayrault, 31 Barb. (N. Y.) 364; Williams v. Fitzhugh, 37 N. Y. 444; Blydenburgh v. Cotheal, 5 N. J. Eq. (1 Halst.) 631; Dobbin v. Hewett, 19 La. Ann. 513; Cubbedge v. Napier, 62 Ala. 518.

the loan received by an agent of the mortgagor who resides in another state, the contract will be governed by the law of the former state.¹ But the parties may contract with reference to the law of a state other than that where the land is situated, and if the note or mortgage be made payable in that state, the law of that state will govern in the construction and legal effect of the contract.² The parties may stipulate for interest with reference to the laws of either the place of contract or the place of payment, so long as the provision be made in good faith, and not as a cover for usury.³

When a contract is made payable in another state for the purpose of evading the usury laws of the state where the contract is executed, the question is not which law shall govern in executing the contract, but which shall decide the fate of the security. Unquestionably it is the law of the place of contract.⁴

By statute in Michigan the interest on mortgages may be made payable out of the state at such place as the parties may agree upon, although the rate of interest in such place may be less than in this state; and the rate of interest reserved is not affected by the laws of the place where payment is to be made.⁵

658. But the laws of another state cannot be imported into a contract by a mere mental operation or understanding of the parties, for the purpose of making the character of the loan different from what it is under the law of the place of contract. A mortgage was made in New York, where both of the parties to it resided, of land situate in Wisconsin, and interest was reserved at the rate of twelve per cent., which was legal in the latter but not in the former state. The only pretext that the loan was made with reference to the law of Wisconsin was that the mortgagor had money due to her there at twelve per cent. interest, which the borrower there desired to retain, and therefore he was willing, and agreed to pay that rate for money borrowed in New York, to relieve temporary wants. But the loan being made in New York, where it was also to be repaid, and the use of the

¹ *Mills v. Wilson* (Pa. 1878), 7 Report-er, 218; S. C. 6 W. N. C. No. 23.

² *Robinson v. Bland*, 2 Burr. 1077; *Slocum v. Pomeroy*, 6 Cranch, 221; *Fitch v. Remer*, 1 Flippin, 15; *Duncan v. Helm*, 22 La. Ann. 418; *Nichols v. Cosset*, 1 Root (Conn.), 294. See *Oregon & Wash-*

ington T. & I. Co. v. Rathbun, 5 Sawyer, 32.

³ *Townsend v. Riley*, 46 N. H. 300; *Peck v. Mayo*, 14 Vt. 33, 38.

⁴ *Andrews v. Pond*, 13 Peters, 65, 78; *Mix v. Madison Ins. Co.* 11 Ind. 117.

⁵ *Compiled Laws of Mich.* 1871, pp. 541, 542.

money being unrestricted, the reason why the borrower was willing to pay more than lawful interest was immaterial. The transaction was, therefore, governed by the laws of New York, under which the mortgage was usurious.¹ The same decision was reached in a case where the facts were substantially the same, except that the mortgagor resided in Ohio, where the mortgaged lands were situated. The mortgage was executed in New York, and was made payable there; and the contract was therefore governed by the laws of that state.² A like decision was made in Ohio with reference to a loan negotiated in the State of New York, where the money was advanced, and a note and mortgage payable there taken as security; although the mortgage covered lands in Ohio, it was held that the laws of the State of New York relating to usury were applicable to the transaction.

659. But a contract made in a state where it is valid, to be performed in another where it would be invalid, may after all be held valid by referring it to the law of the state where it was made.³ The question which law shall govern depends upon the law applicable to the contract itself, and not upon the fact that the mortgage, considered alone, would be valid by the law of the state where the lands lie. "The place of payment may, in the absence of any more controlling circumstances, be sufficient to show that the parties intended to refer their contract to the law of that place. But if the loan was actually made in another state, the money to be used there, the parties residing there, the security given there, and if by that law the contract would be valid, and it would be invalid by the law of the place of payment, these facts may well be held to have a stronger influence in showing the intention than the mere place of payment, and the rule itself resting upon that intention, where the intention is rebutted the rule should cease."⁴

Where a mortgage of land in Michigan was executed in New York, the mortgagee then residing there, where also the mortgage was made payable, and the rate of interest was ten per cent., which was usurious in the latter state but was valid in the former, it was held that the mortgagee might elect to proceed to

¹ *Cope v. Wheeler*, 41 N. Y. 303; S. C. 53 Barb. 350; 46 Ib. 272. *Fisher v. Otis*, 3 Chand. (Wis.) 83; S. C. 3 Pinn. (Wis.) 78; *Depau v. Humphreys*,

² *Williams v. Fitzhugh*, 37 N. Y. 444; *Lockwood v. Mitchell*, 7 Ohio St. 387. 20 Martin (La.), 1; *Peck v. Mayo*, 14 Vt. 33.

³ *Chapman v. Robertson*, 6 Paige (N. Y.), 627; *Pratt v. Adams*, 7 Ib. 615; ⁴ *Newman v. Kershaw*, 10 Wis. 333, 340, per Paine, J.

enforce the mortgage in Michigan; for it was to be presumed that the contract was made with reference to the interest laws of that state.¹

660. The *lex rei sitæ* does not control. — The authorities generally do not regard the circumstance that the loan is secured by mortgage in determining whether it be usurious.² Thus a loan made in New Hampshire, upon land situated there, may be made payable in New York, and may provide for the payment of interest at the rate of seven per cent., being the rate allowed there, though this be a higher rate than that allowed by the laws of New Hampshire, if this arrangement be made in good faith, and not for the purpose of evading the laws of New Hampshire; and such mortgage with interest, at the rate so provided, will be enforced by foreclosure of the mortgage in New Hampshire.³ Although the mortgage be by express terms payable in New Hampshire, the parties may after its maturity agree that the interest shall be paid "as by law established in New York," where the mortgagor then resided; and such agreement made in good faith will be enforced in New Hampshire. "It is true," said Mr. Justice Bellows, "that in many cases interest may properly be regarded as a mere incident of the debt, and so payable only where the principal is payable; but this is by no means always the case, for by express stipulation the interest may become payable by itself, and a suit maintained for it before the principal becomes due, as in the case of a contract to pay interest annually; so in the case of bonds with coupons attached; and we see no objection to the parties being allowed to fix the amount of interest, and the time and place of payment of it, as they may all other particulars of the contract, provided it be done in good faith, and with no design to evade the usury laws."⁴

A mortgage made in Ohio upon land in that state, but made payable in New York with interest at the rate of ten per cent.,

¹ *Fitch v. Remer*, 1 Flippin, 15. See full examination of the question by McLean, J., in this case.

² In *Connor v. Bellamont*, 2 Atk. 382, Lord Hardwicke allowed Irish interest upon a debt contracted in England, but secured by a bond and mortgage executed in Ireland. In *Stapleton v. Conway*, 3 Atk. 727, the same eminent judge said that if a contract is made in England for

a mortgage of a plantation in the West Indies, no more than legal interest shall be paid upon such mortgage; and a covenant in it to pay eight per cent. interest is within the statute of usury, notwithstanding that was the rate of interest where the land lies.

³ *Townsend v. Riley*, 46 N. H. 300.

⁴ In *Townsend v. Riley*, *supra*.

which is a legal rate in the former state but not in the latter, was treated as a contract made in Ohio with reference to the laws of that state, although the mortgagee resided in Connecticut, and the loan was made by means of a draft paid in New York.¹

A like decision was also made in Wisconsin, in a suit to foreclose a mortgage of lands situate in that state, made in New York, where the parties resided, and where the loan was made payable; therefore the laws of that state were held to govern the contract as to its validity and effect;² but the decision would have been otherwise in case the mortgage had been made payable in Wisconsin, or perhaps had been made there.³

But the courts of New York refused to declare void a mortgage made in Minnesota upon land in that state, with interest at the rate of twenty-five per cent. per annum, although the mortgage debt was made payable in New York; for the rate of interest was considered as fixed with reference to the place of contract.⁴

The law of the place of contract, or of the place of performance, determines the question whether the mortgage be valid or usurious, irrespective of the place where the land, which is the subject of the mortgage, is situated.⁵ The location of the land mortgaged may perhaps in some cases be considered in connection with the place of contract, or the place of performance, in determining whether the parties contracted with reference to the law of the one place or of the other; but on the authorities this seems to be all the consideration that can be given to this circumstance.⁶

661. On the other hand, it is said that the remedy against the mortgagor personally may be pursued wherever the debtor may be, and therefore suit may be brought against him in a state other than that in which the mortgaged premises are; but that the lien upon the land can be enforced only in the state where the land is situated. The *lex fori* and the *lex rei sitæ* in this respect must always be the same. It is, moreover, a well settled principle that title to real property must be acquired agreeably to the law of the place where it is situated. This principle ap-

¹ Roelofson v. Atwater, 1 Disney Dolman v. Cook, 14 N. J. Eq. 56; Campion v. Kille, Ib. 229; Andrews v. Torrey, Ib. 346.

² Newman v. Kershaw, 10 Wis. 333.

³ Kennedy v. Knight, 21 Wis. 340.

⁴ Balme v. Wombough, 38 Barb. (N. Y.) 352.

⁵ See Newman v. Kershaw, *supra*;

⁶ De Wolf v. Johnson, 10 Wheat. 367; Kennedy v. Knight, *supra*.

plies to mortgages as well as to absolute conveyances;¹ and of course the remedy to enforce the lien must be sought where the property is. The validity of a mortgage must therefore be determined by the law of the state where the mortgaged land is, wherever the deed may have been executed or the mortgage debt made payable.²

In regard to these cases it is to be observed that *Hosford v. Nichols* was decided upon the ground that the contract was in fact executed in New York, where the land was situated, and therefore is no authority for the position that the law of the place where the land is situated, rather than the law of the place of contract, governs as to usury. The later case of *Chapman v. Robertson* has often been criticised, and, so far as it holds that the *lex rei sitæ* governs as to usury, it has been repeatedly overruled by the later cases in New York.

A person residing in New York being in England, there negotiated a loan upon the security of a bond and mortgage upon lands in New York, at the legal rate of interest in that state. It was arranged that upon the return of the borrower to New York he should execute and record the mortgage, and that upon the receipt of it in England the mortgagee should deposit the money with the mortgagor's bankers in London for his use. This was done accordingly. The mortgage was usurious under the laws of England; but it was held, in a suit to foreclose the mortgage, that the usury laws of England could not be set up in defence. Chancellor Walworth said: "Upon a full examination of all the cases to be found upon the subject, either in this country or in England, none of which, however, appear to have decided the precise question which arises in this cause, I have arrived at the conclusion that the mortgage executed here, and upon property

¹ *Hosford v. Nichols*, 1 Paige (N. Y.), 220, per Walworth, Chancellor. See *Van Schaick v. Edwards*, 2 Johns. Cas. (N. Y.) 355; *Oregon* and *Washington T. & I. Co. v. Rathbun*, 5 Sawyer, 32.

² In support of this position are cited the cases in the last note and the following: *Goddard v. Sawyer*, 9 Allen (Mass.), 78, cited and approved in *Sedgwick v. Laffin*, 10 Ib. 430, 432, per Gray, J.; *Lyon v. McIlvaine*, 24 Iowa, 9.

In *Goddard v. Sawyer*, *supra*, a mortgage was made in New Hampshire, where both parties resided, of land in Massachu-

setts, to indemnify the mortgagee against a liability to arise subsequently. Such a mortgage being invalid under the laws of New Hampshire, this invalidity was set up to an action in Massachusetts to foreclose the mortgage. The court — Metcalf, J., delivering the opinion — say: "The question as to the validity of the mortgage in this case is to be decided by the law of this state, within which the mortgaged premises are situate, and not by the law of New Hampshire where it was executed, and where the parties thereto resided."

in this state, being valid by the *lex situs*, which is also the law of the domicile of the mortgagor, it is the duty of this court to give full effect to the security, without reference to the usury laws of England, which neither party intended to evade or violate by the execution of a mortgage upon lands here."¹

Then as to the case of *Goddard v. Sawyer*, in Massachusetts, that does not relate to the contract but rather to the form and validity of the instrument itself. The learned judge who gives the opinion refers to a case before the Supreme Court of the United States, holding that title to land by devise can be acquired only under a will duly approved and recorded, according to the law of the state in which the lands lie, and in which Mr. Justice Washington says: "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." Another reference in the Massachusetts case is to an earlier case in that state, the principal bearing of which upon the case before the court is in the statement of the principle, that "the title to and disposition of real estate must be exclusively regulated by the law of the place in which it is situated." The conclusion therefore is, that although there are some statements which would seem to support the position, that the question of usury in a mortgage executed and made payable in a state other than that where the land is situated is to be determined by the laws of the state where the land is situated, there is really no authority for this position.²

662. But as to the form and validity of the mortgage deed as a conveyance, the law of the place where the land is situated must always govern. Thus, if the laws of the state where the lands are situated recognize the validity of a mortgage by the deposit of the title deeds by a debtor with his creditor, then the laws of that state govern as to the lien, although the transaction be had in another state.³ But if such a mortgage be not recognized in the state where the lands are, the fact that a deposit is made in a state or country where a mortgage in this form is recognized will not enable the creditor to enforce it against the lands. And so if the laws of a state prohibit the making of a

¹ *Chapman v. Robertson*, 6 Paige (N. Y.), 627.

² The only other case referred to is *Hosford v. Nichols*, 1 Paige (N. Y.), 220.

³ *Griffin v. Griffin*, 18 N. J. Eq. 104.

mortgage to secure future advances or liabilities, a mortgage in this form of land in that state would not be recognized there, although made in a state where such a mortgage would be valid; and, on the other hand, such a mortgage made in the former state where it would not be valid, but covering lands in a state where such a mortgage is valid, would be enforced in the latter state, because it is a valid conveyance there.¹

663. To avail of the usury laws of another state as a ground for defence, they must be distinctly set up in the answer, and at the hearing must be proved as matters of fact.² Under an answer setting up usury without any more specific allegation, and without any averment showing that the contract is governed in this respect by the laws of another state, the defence is limited to the statutes against usury of the state where the action is pending.³ Until otherwise proved, the laws of another state, in regard to usury, will be presumed to be the same as those of the *lex fori*.⁴

When in the course of the pleadings it is discretionary with the court to allow the defence of usury to be set up, the court may refuse to allow the statute of another state whose laws govern the contract to be pleaded, when that statute makes the mortgage wholly void, such a defence being regarded as unconscionous.⁵

The law in force at the time of the delivery of a mortgage governs its validity or construction, so far as these are affected by statute.⁶ A mortgage made in Alabama during the civil war was enforced in the courts of that state, acting under the Constitution and laws of the United States after the close of the war, although the consideration of it was a loan of Confederate treasury notes,⁷ on the ground that it was valid under the government *de facto* which then existed.

A stay law, making void and of no effect all mortgages and deeds of trust for the benefit of creditors, thereafter executed,

¹ Goddard v. Sawyer, 9 Allen (Mass.), 78.

² Champion v. Kille, 14 N. J. Eq. 229; Dolman v. Cook, *ib.* 56; Andrews v. Torrey, *ib.* 355; Klinck v. Price, 4 W. Va. 4; Hosford v. Nichols, 1 Paige (N. Y.), 220.

³ Champion v. Kille, *supra*.

⁴ Van Anken v. Dunning, 81 Pa. St. 464.

⁵ Corning v. Ludlum, 28 N. J. Eq. 398.

⁶ Olson v. Nelson, 3 Minn. 53; Latrobe v. Hulbert (C. C. Ohio, 1881), 6 Fed. Rep. 209.

⁷ Scheible v. Bacho, 41 Ala. 423, and cases cited. See to the contrary, however, Stillman v. Looney, 3 Coldw. (Tenn.) 20. See § 617.

whether registered or not, does not apply to a mortgage executed prior to the passage of the act, but registered after its passage.¹ Being valid when made, it is not competent for the legislature afterwards to make it invalid.² A mortgage made at a time when there is no statute limiting the rate of interest is a valid security, although the rate of interest be extortionate; and its validity is not affected by a subsequent statute or change in the Constitution of the state limiting the rate of interest.³

Although the law of the place of contract governs as to the question of usury, yet a law of the place of contract relating to the manner of enforcing the remedy is not binding upon the courts of another state. Thus a statute of the State of New York authorizing a borrower to obtain a cancellation of securities without payment, upon the ground of usury, will not be enforced in Massachusetts.⁴

¹ *Harrison v. Styres*, 74 N. C. 290.

² *Harrison v. Styres*, *supra*.

³ *Newton v. Wilson*, 31 Ark. 484; *Jacoway v. Denton*, 25 Ark. 625.

⁴ *Matthews v. Warner* (C. C. Mass. 1881), 6 Fed. Rep. 461. That statute is so strictly construed in New York that it

is held not to apply to an assignee in bankruptcy of the borrower; *Wheelock v. Lee*, 15 Abb. Pr. N. S. 24; S. C. 64 N. Y. 242; nor to a purchaser of the equity of redemption. *Bissell v. Kellogg*, 65 N. Y. 432.

CHAPTER XV.

A MORTGAGOR'S RIGHTS AND LIABILITIES.

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| I. As to third persons, 664-666. | | IV. After-acquired titles and improvements, 679-683. |
| II. As to the mortgagee, 667-676. | | V. Waste by mortgagor, 684-698. |
| III. His personal liability to the mortgagee, 677, 678. | | |

Introductory. — The nature of a mortgage was considered in the first chapter, and some of the rules and statutes were there stated which determine in large part the rights and liabilities of the parties. The rights of the parties with reference to particular matters have been considered in other chapters. In fact the whole treatise relates, in some form, to the rights or liabilities of either the mortgagor or mortgagee; but in this and the following chapters of this volume it is proposed to treat of the general relations of the parties to each other and to third persons; but inasmuch as their relations to a purchaser of the equity of redemption, to a lessee of the mortgaged property, and to an assignee of the mortgage, present many important questions in respect to each, special chapters will be given to the consideration of these.

1. *As to Third Persons.*

664. The owner of the equity of redemption is entitled to possession as against every one except the mortgagee and those claiming under him, and may, as against any others, maintain a real action to recover possession.¹ Against all other persons he has the same rights respecting the mortgaged premises that he ever had.² He may, so far as his interest goes, deal with it in every respect as the owner. He may devise it, sell it, or lease it, or make any contracts in respect to it.³ His conveyance

¹ *Huckins v. Straw*, 34 Me. 166; *Stinson v. Ross*, 51 Me. 556; *Bird v. Decker*, 64 Me. 550; *Ellison v. Daniels*, 11 N. H. 274; *Hall v. Lance*, 25 Ill. 277; *Duval v. McLoskey*, 1 Ala. 708.

² *Orr v. Hadley*, 36 N. H. 575; *Wil-*

kins v. French, 20 Me. 111; *Chamberlain v. Thompson*, 10 Conn. 243; *Bartlett v. Borden*, 13 Bush (Ky.), 45.

³ *Kennett v. Plummer*, 28 Mo. 142; *Grigg v. Banks*, 59 Ala. 311.

is so far a conveyance of the land that the covenants real are annexed to it, and pass with it to the grantee and his assigns.¹ The wife of a mortgagor is entitled to dower, and the husband of a mortgagor to curtesy in the mortgaged premises. The equity of redemption is subject to attachment and to sale upon execution by the mortgagor's creditors. He has the remedies of an owner as against every one, except the mortgagee, who interferes with his possession or enjoyment of the land.² At common law, as between the mortgagor and mortgagee, the legal title is in the latter, and so remains even after the debt is paid, if it be not paid till after the law day.³ But no one can avail himself of this title but the mortgagee; and therefore, in case of an action of ejectment brought by a second mortgagee against the mortgagor, the latter cannot set up the legal title of the prior mortgagee as a defence. The fact that he has such an interest in the land as will enable him to redeem, can make no difference. Until he does redeem, he is a stranger to the legal title.⁴ The fact that the mortgagor has paid since the law day, but has taken no discharge, constitutes no defence to an action of ejectment.⁵

So long as the mortgagor remains in possession, and does not commit waste, he may lawfully dispose of the products of the land.⁶ He may recover damages for waste committed by a stranger, in cutting and removing trees and lumber manufactured from them.⁷ As against the mortgagee he is entitled to receive the rents and profits of the mortgaged land, and to take the emblements, without being liable to account. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor; but except as to such remedies, and as to all persons but the mortgagee, a mortgagor in possession is to be regarded and treated as the owner of the estate, subject merely to a lien or charge.⁸ The legal title passes by the mortgage merely for the purpose of giving the mortgagee the full benefit of

¹ *White v. Whitney*, 3 Met. (Mass.) 81.

² *Denby v. Mellgrew*, 58 Ala. 147.

³ *Chamberlain v. Thompson*, 10 Conn. 243; *Cross v. Robinson*, 21 Conn. 379; *Smith v. Vincent*, 15 Conn. 1; *Toby v. Reed*, 9 Conn. 216; *Cooch v. Gerry*, 3 Harr. (Del.) 280.

⁴ *Savage v. Dooley*, 28 Conn. 411.

⁵ *Doton v. Russell*, 17 Conn. 146.

⁶ *Kimball v. Lewiston Steam Mill Co.* 55 Maine, 494.

⁷ *Bird v. Decker*, 64 Me. 550; *Abney v. Austin*, 6 Bradw. (Ill.) 49.

⁸ *Willington v. Gale*, 7 Mass. 138; *Taylor v. Porter*, 7 Mass. 355; *Goodwin v. Richardson*, 11 Mass. 469, 473; *Snow v. Stevens*, 15 Mass. 278; *Eaton v. Whiting*, 3 Pick. (Mass.) 484, 488; *Blanchard v. Brooks*, 12 Ib. 47; *Fay v. Cheney*, 14 Ib. 399; *Clark v. Reyburn*, 1 Kans. 281; *Collins v. Torrey*, 7 Johns. (N. Y.) 278; *Greer v. Turner*, 36 Ark. 17.

the security.¹ He may recover possession of the land in an action of ejectment from a stranger who has entered without right,² and he may recover damages for injuries to his possession by such wrong-doer.

After possession has been taken by the mortgagee for the purpose of foreclosure, the mortgagor cannot maintain an action of tort against a stranger for using it as a way. There being no injury to the reversionary interest, the mortgagee is the only party entitled to maintain such action.³

665. The mortgagor's equity of redemption may be seized upon execution by a third person, or even by the mortgagee, upon an execution obtained upon a debt not secured by the mortgage.⁴ The levy of an execution by any other creditor, or the sale under it, does not affect the rights of the mortgagee.⁵ A purchaser of the equity of redemption at execution sale succeeds to the equitable rights of the mortgagor, and may redeem the estate just as the mortgagor could.⁶ It is immaterial as regards such sale whether the incumbrance be strictly a mortgage or a deed of trust with power of sale upon default, for such a deed is in legal effect a mortgage.⁷ The mortgagee may, however, by consenting to a sale of the mortgaged property, or to a levy upon it, without reference to his mortgage, debar himself from asserting his title afterwards.⁸

If there be a surplus of the purchase price of the equity of redemption after paying the judgment and costs, this should be paid to the judgment debtor and not to the mortgagee.⁹

If no account be taken of the mortgage in making the levy, the interest of the debtor, and nothing more, passes by the proceedings.¹⁰ The levy is not thereby rendered invalid.¹¹ The debtor, in such case, has no occasion to complain.¹²

¹ *Glass v. Ellison*, 9 N. H. 69; *Bartlett v. Borden*, 13 Bush (Ky.), 45; *Oldham v. Pfleger*, 84 Ill. 102.

² *Bartlett v. Borden*, *supra*.

³ *Sparhawk v. Baggs*, 16 Gray (Mass.), 583.

⁴ §§ 1230, 1230; *Cushing v. Hurd*, 4 Pick. (Mass.) 253; *Walters v. Defenbaugh*, 90 Ill. 241; *Finley v. Thayer*, 42 Ill. 350.

⁵ *Febeiger v. Craighead*, 4 Dall. 151; *Crow v. Tinsley*, 6 Dana (Ky.), 402; *Cotten v. Blocker*, 6 Fla. 1; *Childress v.*

Monette, 54 Ala. 317; *Atcheson v. Broadhead*, 56 Ala. 414.

⁶ *Turner v. Watkins*, 31 Ark. 429; *Shaw v. Lindsey*, 60 Ala. 344; *Lovelace v. Webb*, 62 Ala. 271; *Jenkins v. Green*, 22 Kans. 562.

⁷ *Turner v. Watkins*, *supra*.

⁸ *Grace v. Mercer*, 10 B. Mon. (Ky.) 157; *Smith v. Sweetser*, 32 Ma. 246.

⁹ *Jenkins v. Green*, 22 Kans. 562.

¹⁰ *Dunbar v. Starkey*, 19 N. H. 160.

¹¹ *Pettee v. Peppard*, 125 Mass. 66.

¹² *Perrin v. Reed*, 35 Vt. 2.

After a sale upon execution the mortgagor has no rights in the land unless he redeems it, or unless the judgment upon which the execution was issued be reversed.¹

Inasmuch as an absolute deed with a bond for reconveyance constitute an express mortgage, the property is subject to attachment and to levy and sale upon execution under a judgment against the grantor.²

If a mortgagee be in possession of the mortgaged premises after condition broken, a sale under execution against the mortgagor does not divest him of possession, or enable the purchaser to recover possession in an action of ejectment. His only remedy is to redeem.³

In some states the laws provide for a sale of the debtor's right of redeeming mortgaged land, while land not covered by a mortgage can only be taken by a levy and set-off in the usual way, and is not the subject of sale on execution. Where such is the law, if one owning a tract of land in fee mortgages a life estate, the reversion is not covered by the mortgage, and therefore his title to it is not an equity of redemption, and cannot be sold as constituting a part of his equity of redemption. When the life estate expires, the equity of redemption expires with it. If the mortgage is foreclosed, the reversion remains. If the equity is sold on execution, the reversion remains. No interest not covered by the mortgage passes by the sale.⁴

If an estate be subject to a mortgage when attached, but the mortgage be discharged before the levy of an execution in the suit, the estate cannot be levied upon and sold as an equity of redemption.⁵

The sale is valid though there be a right of homestead in the debtor, and the sale is not expressly made subject to it. The sale

¹ *Delano v. Wilde*, 11 Gray (Mass.), 17.

² *Clinton Nat. Bank v. Manwarring*, 39 Iowa, 281; *Moors v. Albro*, 129 Mass. 9. *Contra*, *Phinizy v. Clark*, 62 Ga. 623; *Gibson v. Hough*, 60 Ga. 588.

³ *Hall v. Tunnell*, 1 Houst. (Del.) 320; *Dadmun v. Lamson*, 9 Allen (Mass.), 85.

In *Alabama* it is held that where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default be made in the payment of bonds

extending through several years, the mortgagor has a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale acquires a title on which he may recover, in ejectment, against any one who does not show a paramount title. *Bernstein v. Humes*, 60 Ala. 582. See *Shaw v. Lindsey*, 60 Ala. 344.

⁴ *Laffin v. Crosby*, 99 Mass. 446.

⁵ *Hackett v. Buck*, 128 Mass. 369. Act of 1874, c. 188, does not authorize a sale in such a case.

is necessarily subject to that right, and whether declared so or not it is immaterial.¹

If land subject to a mortgage be attached, and afterwards the mortgagee sells the land under a power of sale for more than enough to pay the mortgage debt and the expenses of sale, the attaching creditor may, by a bill in equity brought within the time the land would have been held as security to satisfy the judgment, enforce his lien against the surplus remaining in the hands of the mortgagee.² His claim has preference over a second mortgage made after the attachment. The surplus after the sale belongs to the same persons the land belonged to before the sale. No means being provided by statute for enforcing the creditor's lien against the funds, equity will afford a remedy, to the same effect and upon the same conditions as nearly as may be, as in proceedings at law in like cases.³

Land owned by a single woman at the time of her marriage was afterwards attached in an action against her by her maiden name, the creditor being ignorant of the marriage, and judgment was afterwards recovered against her by the same name and the land was sold on execution. After the attachment, and before judgment, the woman, by her married name, mortgaged the same land to a person who had no actual notice of the attachment. The attachment was held to take precedence of the mortgage.⁴

666. The widow of the mortgagor is entitled to dower in an equity of redemption, although she has released her right in the mortgage.⁵ She cannot maintain an action for it against the mortgagee, yet if the mortgage is not foreclosed, she is allowed in equity to redeem the mortgage, and then take her dower.⁶ Foreclosure or sale under a power effectually bars her right if she has duly released this in the mortgage.⁷ She is entitled to dower in the whole estate as against every one but the mortgagee, but to redeem the land from him, she must pay the whole amount due

¹ *Swan v. Stephens*, 99 Mass. 7.

² *Wiggin v. Heywood*, 118 Mass. 514.

³ Per Gray, C. J., in *Wiggin v. Heywood*, *supra*.

⁴ *Cleaveland v. Boston Five Cents Savings Bank*, 129 Mass. 27.

⁵ Otherwise in England, where dower is a legal estate. *Story's Eq. Jur.* § 629; *Kent. C.*, in *Titus v. Neilson*, 5 Johns. (N. Y.) Ch. 452; *Snow v. Stevens*, 15 Mass. 278.

⁶ *Eaton v. Simonds*, 14 Pick. (Mass.)

98; *Van Dyne v. Thayer*, 14 Wend. (N. Y.) 233; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Collins v. Torrey*, 7 Ib. 278; *Coles v. Coles*, 15 Ib. 319; *Hawley v. Bradford*, 9 Paige (N. Y.), 200; *Swaine v. Perine*, 5 Johns. (N. Y.) Ch. 491; *Trenholm v. Wilson*, 13 S. C. 174.

⁷ *Johnson v. Watson*, 87 Ill. 535.

on the mortgage.¹ If, however, the mortgage be discharged by the other party in interest, the widow of the mortgagor is let into her dower in the unincumbered estate; as where the purchaser of the equity of redemption, on an execution sale, afterwards paid the amount due on the mortgage and claimed an assignment of it from the mortgagee, but the mortgagee declaring that an assignment was unnecessary, discharged it upon the margin of the record; it was held that this discharge operated to extinguish the mortgage, and not as an equitable assignment of it, and that therefore the widow was dowerable in the land free from the incumbrance of the mortgage.²

The widow of one who has purchased real estate and assumed the payment of a mortgage thereon is entitled to dower only under the same conditions.³

If a purchaser pays off a mortgage to which the right of dower would be subject, when he is under no obligation to pay the mortgage debt, and takes an assignment of the mortgage, his mortgage title will prevent an assignment of dower in the whole estate;⁴ and even if the mortgage be discharged and not in form assigned to him, he may in some cases be held to have redeemed the mortgage.⁵ But if the mortgage debt be paid by the debtor, or from his property, or in his behalf, such payment is a discharge of the mortgage, and dower can be assigned in the whole property;⁶ and the payment is in behalf of the debtor, when he in any manner furnishes the means of payment, or imposes an obligation on the purchaser to assume and pay the debt as his own. In such cases an assignment of the mortgage amounts to a discharge, and the legal title under the mortgage merges in the equity.⁷

If an heir or devisee give a bond conditioned to pay all the debts of the deceased, and he take an assignment of a mortgage of a part of the real estate to himself, it would seem that he could not stand upon his mortgage title, and by foreclosure defeat the widow's estate of dower and homestead; because the bond in this

¹ *McCabe v. Bellows*, 7 Gray (Mass.), 557; *Newton v. Cook*, 4 Gray (Mass.), 148; *Graves v. Braden*, 62 Ind. 93; *Campbell v. Campbell*, 30 N. J. Eq. 415; *McMahon v. Russell*, 17 Fla. 698, 705.

² *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Wedge v. Moore*, 6 Cush. (Mass.) 8. See chapter xx, on "MERGER."

³ *Kemerer v. Bournes*, 53 Iowa, 172.

⁴ *Strong v. Converse*, 8 Allen (Mass.),

⁵ See chapter xx, on "MERGER."

⁶ *Holmes v. Holmes*, 3 Paige (N. Y.), 363; *Bolton v. Ballard*, 13 Mass. 227; *Brown v. Lapham*, 3 Cush. (Mass.) 551, 554.

⁷ See chapter xx, on "MERGER." *McCabe v. Swap*, 14 Allen (Mass.), 188, per Wells, J.

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case may be regarded as supplying the place of the assets which would otherwise have been derived from the sale of the lands;¹ and certainly in such case if dower in the mortgaged premises had already been assigned to the widow, with the assent of the heir or devisee, he could not set up his mortgage title under the assignment or foreclosure against the dower estate.²

2. *As to the Mortgagee.*

667. The mortgagor is really a tenant at will, and may be ejected by the mortgagee without notice, except in those states where the mortgagor is by statute confirmed in his possession until foreclosure, unless the mortgage contains a covenant or agreement allowing the mortgagor to remain in possession until a breach of condition occurs; for, unless there be such a covenant, the mortgagee may at any time enter and dispossess him, or may recover possession by a writ of entry.³ Yet, while the mortgagor is left in possession, he is in most respects regarded as the owner of the land, and he may occupy and improve, or may take the rents and profits to his own use, in the same manner as before he made the mortgage.⁴ The commencement of an action against him by the mortgagee to recover possession does not change his rights in this respect, and he is not accountable for the rents and profits accruing afterwards, and before the mortgagee is entitled to possession under the judgment. If the mortgagee wishes to receive the rents and profits, he must take early means to obtain possession.⁵

¹ King v. King, 100 Mass. 224.

² King v. King, *supra*.

See §§ 11, 15, 703; Keach v. Hall, 1 Doug. 21; Rockwell v. Bradley, 2 Conn. 1, where the point is fully discussed; Brown v. Cram, 1 N. H. 169; Hartshorn v. Hubbard, 2 N. H. 453; Simpson v. Ammons, 1 Binn. (Pa.) 175; Smith v. Shuler, 12 S. & R. (Pa.) 240; Martin v. Jackson, 27 Pa. St. 504; Youngman v. Elmira & Williamsport R. R. Co. 65 Pa. St. 278; Watford v. Oates, 57 Ala. 290.

So provided by statute in Vermont: R. L. 1880, § 1258.

⁴ Taliaferro v. Gay, 78 Ky. 496; Anderson v. Strauss, 98 Ill. 485.

⁵ Wilder v. Houghton, 1 Pick. (Mass.) 87; White v. Wear, 4 Mo. App. 341. "As to the mortgagor," says Lord Hardwicke,

in Mead v. Orrery, 3 Atk. 244, "I do not know of any instance, where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into possession." And again, in Higgins v. York Buildings Company, 2 Atk. 107, the same judge said: "Upon a bill brought by the mortgagee for an account in this court, he never can have a decree for an account of rents and profits from the mortgagor for any of the years back during the possession of the mortgagor."

See, also, Wilson, *Ex parte* 2 Ves. & B. 252. The text is quoted and approved by McAllister, J., in Silverman v. N. W. Mut. Life Ins. Co. 5 Bradw. (Ill.) 124.

But the mortgagee cannot, before actually taking possession, give another person any right to the possession of the premises, to the exclusion of the owner of the equity of redemption.¹

The making of the mortgage deed, and the subsequent possession of the mortgagor, furnish no presumption of a license from the mortgagee to the mortgagor to remain in possession.² If both the mortgagor and mortgagee be living together in possession of the premises after condition broken, it is not a case of mixed possession, as between tenants in common, but the possession is in one or the other; and in which it is, is a question of fact for the jury to determine.³

An affirmative covenant that the mortgagor shall retain possession of the premises with power to take the rents and profits until default, with a limitation of time beyond which his possession shall not extend, amounts to a redemise. But a redemise is not to be inferred from a covenant that the mortgagor will not sell or lease until after notice.⁴

The mortgagor's reservation of the right of possession seldom extends his right beyond a breach of the condition by him; and therefore, except in those states in which by statute the mortgagee has no right of possession before foreclosure, he may immediately, upon default, take possession.⁵

When the mortgagee is entitled to possession, and brings an action to recover it, the mortgagor cannot defend on the ground that the mortgage was made to defraud creditors. He is not allowed to annul his own conveyance, under which a perfect legal title has passed to the mortgagee.⁶

668. His right of possession may be implied from the nature of the condition, as where a mortgage provided that he should occupy and cultivate a farm, and deliver to the mortgagee one half of the produce of it. By accepting an estate with such a condition, the mortgagee is as much estopped from claiming possession as he would have been if he had agreed by indenture that the mortgagor should retain exclusive occupation. If, before default, the mortgagor's possession be disturbed by entry of the

¹ *Silloway v. Brown*, 12 Allen (Mass.), 30; *Mayo v. Fletcher*, 14 Pick. (Mass.) 525, 531.

² *Wakeman v. Banks*, 2 Conn. 445.

³ *Hall v. Tunnell*, 1 Houston (Del.), 320.

⁴ *George's Creek Coal & Iron Co. v. Detmold*, 1 Md. 225.

⁵ *Pierce v. Brown*, 24 Vt. 165; *Pratt v. Skolfield*, 45 Me. 386; *Stevens v. Brown*, Walk. (Mich.) 41; *Hill v. Robertson*, 24 Miss. 368.

⁶ *Brookover v. Hurst*, 1 Metc. (Ky.) 665.

mortgagee, except for the purpose of taking away his own share of the produce, he is liable in an action of trespass.¹ So, also, if a mortgagee take a lease of the premises from the mortgagor, and covenant to pay him rent until the condition be broken, this amounts to an agreement that the mortgagor shall retain possession, and receive the profits to his own use.² A provision in the mortgage, that the mortgagee may enter after default, implies that the mortgagor is entitled to possession until such default.³

A stipulation, that upon default the mortgagee may take possession and receive the rents and profits until the mortgage debt shall be paid, may be enforced by the mortgagee's taking possession and holding it; but the mortgagor is entitled to have the property again at any time upon paying the mortgage debt.⁴

An express stipulation is not necessary to enable the mortgagor to retain possession until a breach of the condition, when the very purpose of the instrument is such, that the mortgagor cannot fulfil his covenants without the possession of the property; as, for instance, when the purpose is to secure an agreement to support.⁵ The mortgagor's right of possession until breach of the condition is implied from a condition that mortgagor shall support the mortgagee during his life in a house upon the premises, or shall deliver to him a certain portion of the produce annually.⁶ By taking possession in such case the mortgagee would prevent the mortgagor's carrying into effect the purpose for which alone the mortgage was made.⁷ But a condition of a mortgage requiring the mortgagor to furnish a comfortable home for the mortgagee, and to provide him necessaries and support during his life, there being no intimation that the support was to be provided upon the premises, was regarded by the Supreme Court of Maine as affording no implication that the mortgagor should retain possession.⁸

The agreement that the mortgagor may remain in possession

¹ See §§ 80, 369, 702; *Flagg v. Flagg*, 11 Pick. (Mass.) 475; *Hartshorn v. Hubbard*, 2 N. H. 453; *Flanders v. Lamphear*, 9 N. H. 201; *Rhoades v. Parker*, 10 N. H. 83; *Lamb v. Foss*, 21 Me. 240.

² *Newall v. Wright*, 3 Mass. 138.

³ *Smith v. Taylor*, 9 Ala. 633.

⁴ *McIntyre v. Whitfield*, 21 Miss. (13 Sm. & M.) 88; and see *Hyman v. Kelly*, 1 Nev. 179.

⁵ *Soper v. Guernsey*, 71 Pa. St. 219.

⁶ *Norton v. Webb*, 35 Me. 218; *Brown v. Leach*, 35 Me. 39; *Clay v. Wren*, 34 Me. 187; *Lamb v. Foss*, 21 Me. 240; *Bryant v. Erskine*, 55 Me. 153, 156.

⁷ *Wales v. Mellen*, 1 Gray (Mass.), 512. That he may enter immediately. See *Colman v. Packard*, 16 Mass. 39.

⁸ *Mason v. Mason*, 67 Me. 546.

need not be in the mortgage itself, but may be contained in a separate paper, as, for instance, the mortgage note.¹

669. Right of possession as modified by statute.— It has already been noticed that in several states the common law doctrine of the relation between the mortgagor and mortgagee is wholly done away with, and the mortgagee cannot obtain possession of the mortgaged premises, even after condition broken, except by purchasing them on a foreclosure suit.² Even the foreclosure decree and sale under it do not divest the mortgagor of his right of possession; this is not lost till the deed under the sale is delivered to the purchaser. If the premises are occupied by tenants, the mortgagor may collect the rents until the purchaser is entitled to enter under his deed.³ Under such a statute, although the mortgage contain a stipulation which seems to give the mortgagee the right after condition broken to take possession and receive the rents and profits, yet inasmuch as such a mortgage gives only a lien upon the mortgaged property and the rents and profits, and this lien can be enforced only by action, the stipulation does not transfer to the mortgagee the title to the rents and profits.⁴ An exception to this rule is made in case the property is shown to be inadequate to meet the mortgage debt, in which case the court may appoint a receiver of the rents and profits pending proceedings to foreclose.⁵

Such a statutory provision restraining a mortgagee from obtaining possession is by some courts held to apply in case the mortgage is in the form of an absolute deed.⁶ But it is held otherwise by other courts.⁷

Where the mortgagor is by statute protected in his possession until foreclosure, his possession is a matter of right, and not of sufferance, as it is at common law, except when assured to him by express agreement.⁸ A special provision in a mortgage that the mortgagor shall have possession without paying rent, until breach

¹ *Clay v. Wren*, 34 Me. 187.

² See §§ 17-58.

³ *Gelston v. Burr*, 11 Johns. (N. Y.) 482; *Astor v. Turner*, 11 Paige (N. Y.), 436; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Mitchell v. Bartlett*, 52 Barb. (N. Y.) 319; *Argall v. Pitts*, 78 N. Y. 239; *Barrett v. Blackmar*, 47 Iowa, 565; *Seckler v. Delfs*, 25 Kans. 159.

⁴ *Seckler v. Delfs*, 25 Kans. 159.

⁵ § 1536: *Post v. Dorr*, 4 Edw. (N.

Y.) 412; *Lofsky v. Maujer*, 3 Sandf. (N. Y.) Ch. 69.

⁶ *California*: § 20; and *New York*: *Thompson v. Hickey*, 8 Abb. N. C. 159.

⁷ *Georgia*: § 26; *Iowa*: § 29; *Michigan*: § 36; *Nevada*: § 41.

⁸ *Crippen v. Morrison*, 13 Mich. 23; *Ladue v. Detroit & Milwaukee R. R. Co.* 13 Mich. 380; *Kidd v. Teeple*, 22 Cal. 255; *Hooper v. Wilson*, 12 Vt. 695; *Witherell v. Wiberg*, 4 Sawyer, 232.

of the condition, is not to be construed as conferring the right of possession upon the mortgagee after that event. Such a provision, being merely an expression of what the law implies, is treated as surplusage.¹

A statutory provision that it shall not be waste for the mortgagor to continue to use the mortgaged premises during the period allowed for redemption, may be waived by a stipulation in the mortgage to the contrary.²

670. So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate.³ He is not liable for rent. His contract is to pay interest and not rent. Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise this right he cannot claim the profits.⁴ Upon a bill in equity to obtain foreclosure and sale, he may, in proper cases, apply for the appointment of a receiver to take for his benefit the earnings of the property. He is then confined to the rents and profits accruing during the pendency of the suit.⁵ If he neglect to apply for a receiver, the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earnings in the mean time. It is only after sale under the decree, except where statutes provide otherwise, that the mortgagor is wholly divested of title, and consequently of right to possession.

Upon the death of a mortgagor in possession, his widow is entitled to remain in possession, taking the rents and profits, until her dower is assigned, or until the mortgagee enters or forecloses his mortgage.⁶

These principles are the same whatever may be the subject of the mortgage. Although the mortgage be given by a railroad company, and by its terms includes not only its property and franchises, but also "the tolls, rents, and profits to be had, gained, or levied therefrom," but it is implied from the mortgage that the

¹ *Morrow v. Morgan*, 48 Tex. 304.

² *Edwards v. Woodbury*, 1 McCrary, 429; S. C. 3 Fed. Rep. 14.

³ *Boston Bank v. Reed*, 8 Pick. (Mass.) 459; *Mayo v. Fletcher*, 14 Ib. 525; *Noyes v. Rich*, 52 Me. 115; *Wathen v. Glass*, 54 Miss. 382; *Mississippi Valley & Western Ry. Co. v. U. S. Express Co.* 81 Ill. 534; *Woolley v. Holt*, 14 Bush (Ky.), 788; *Frierson v. Blanton*, 1 Bax. (Tenn.) 272;

Lovelace v. Webb, 62 Ala. 271; *In re Tallassee Manufacturing Co.* 64 Ala. 567; *Hall v. Mobile & Montgomery Ry. Co.* 58 Ala. 10; *Wooten v. Bellinger*, 17 Fla. 289.

⁴ *McKim v. Mason*, 3 Md. Ch. 186.

⁵ *Argall v. Pitts*, 78 N. Y. 239.

⁶ *Cook v. Parham*, 63 Ala. 456; *Boyn-ton v. Sawyer*, 35 Ala. 497.

company is to hold possession and receive the earnings of the road until the mortgagee takes it, or the proper judicial authority should interpose, the possession, so long as it is continuous, gives the right to receive the income of the road, and to apply it to the general purposes and debts of the company. So long as the company is allowed to receive the income of the road, it is within its discretion to decide what shall be done with it. The mortgage does not affect the application of it. If the mortgagees want it they must take possession of the road, or, pending a bill to foreclose the mortgage, apply for the appointment of a receiver.¹ Upon the appointment of a receiver, he cannot maintain a suit to recover earnings of the road in the hands of an agent, which accrued before the receiver's appointment.²

In like manner, if the mortgage be of leasehold premises, and the mortgagor hold over after breach of the condition, the law does not imply an obligation on his part to pay rent previous to an entry by the mortgagee.³

671. Whether the mortgagor is liable to an action for use and occupation after the mortgagee's entry to foreclose seems to be an open question, in the absence of any agreement for payment of rent.⁴ Such an action certainly cannot be maintained after the foreclosure has been completed, if the premises are then worth more than the debt and interest secured by the mortgage; for a completed foreclosure is payment of the mortgage debt, in contemplation of law, if the value of the estate is equal to or greater than the whole sum due.⁵ If the mortgagee be not satis-

¹ *Gilman v. Ill. & Miss. Tel. Co.* 91 U. S. 603. See *Pullan v. Cincinnati & Chicago Air Line R. R. Co.* 5 Biss. 237; *Mississippi Valley & Western Ry. Co. v. U. S. Express Co.* 81 Ill. 534.

² *Noyes v. Rich*, 52 Me. 115.

³ *Mayo v. Fletcher*, 14 Pick. (Mass.) 525.

⁴ *Morse v. Merritt*, 110 Mass. 458; *Merrill v. Bullock*, 105 Mass. 486.

⁵ *Morse v. Merritt*, *supra*.

"A foreclosure," said Mr. Justice Wells, "would not, of itself, prevent recovery of rents previously due from the mortgagor. But such a recovery against him would be held to operate, like a recovery of part of the mortgage debt specifically, to open the foreclosure. Perhaps, in a suit for rents, it might not be

necessary for the plaintiff to show affirmatively that the land was insufficient in value for the full payment of the mortgage debt. The mortgagor's rights would all be secured by the opportunity to redeem thus afforded him. In this case, however, it appears by the report that, at the time of the completed foreclosure, the value of the estate was greater than the whole sum due to the mortgagee, and that the mortgagee has sold and conveyed the estate; so that he ought to be precluded from opening the foreclosure, or denying the sufficiency of the payment. The amount due to him upon his mortgage was ascertained by the decree upon the bill to redeem. No deduction was then made on account of the sums which he now seeks to recover. If they had been

fied, he may recover any deficiency ; and on this ground he might recover rents previously due from the mortgagor.

Although after a breach of the condition of the mortgage, the holder of it having the legal title, and the right of present possession, may, if he sees fit, exercise this right, and he will thereupon become entitled to all the damages that may be done to the possession ; yet if without taking possession under his mortgage he flows the mortgaged land, by means of a mill-dam upon other land belonging to him, such flowing is not an exercise of any right of possession or of ownership. It is not the exercise of any possession under the mortgage. The injury is an incidental result of the exercise of his riparian rights annexed to other lands. So long as the mortgagor is suffered to remain in possession he is entitled, by virtue of that possession, to the damages, notwithstanding the person who caused the flowing is the holder of a mortgage upon the premises flowed.¹

The mortgagee becomes entitled to recover and receive the damages from the time he takes possession, at which time the right of the mortgagor ceases. But the mortgagor may afterwards recover for damages suffered while he was in possession.² The fact, therefore, that the defendant has taken an assignment of the mortgage, is no defence to the mortgagor's right to maintain an action for such damages, so long as, by the terms of the mortgage, the holder of the mortgage is restricted from the right of possession.³

672. A mortgagor does not hold adversely to the mortgagee. His possession is at common law consistent with the right and title of the mortgagee. But a mortgagor may, by his declarations and acts, repudiate the mortgage, deny the title or right claimed under it, and convert his holding into an adverse holding. So may the grantee of the mortgagor.⁴ The possession of a mortgagor, after a foreclosure sale, is presumed to be in subordination to the title of the purchaser ; and the statute of limitations does not run in his favor ;⁵ and the same may be said of his possession

collected when they became due, as is claimed, the amount required for redemption by the decree would have been reduced by so much. He can have no better right now to collect it for his own use, without applying it to the relief of the mortgage, than he had before the foreclosure."

¹ *Vaugh v. Wetherell*, 116 Mass. 138 ; *Paine v. Woods*, 108 Mass. 160.

² *Vaugh v. Wetherell*, 116 Mass. 138 ; *Walker v. Oxford Woollen Manuf. Co.* 10 Met. (Mass.) 203.

³ *Vaugh v. Wetherell*, *supra*.

⁴ *Jamison v. Perry*, 38 Iowa, 14.

⁵ *Seeley v. Manning*, 37 Wis. 574 ; and see *Wright v. Sperry*, 25 Wis. 617.

after a decree of strict foreclosure, and the expiration of the time of redemption.¹ He is a tenant at sufferance of the mortgagee.² The possession of the mortgagor is so far that of the mortgagee that the latter may purchase, while such possession continues, an outstanding title or lien for his own protection, and hold it as paramount to his mortgage title, notwithstanding a statute making void a purchase of land which is at the time in the actual possession of another claiming adversely.³

673. The mortgagor's remedy to recover possession of the mortgagee after payment is in equity; and this is his only remedy.⁴ If ejectment or a writ of entry would lie in such case, the mortgagee would have no remedy to recover for disbursements made by him for repairs; for his right to demand these depends upon the rules of equity, and not those of common law, under which the mortgagee is considered as the absolute owner.⁵ If on a bill by the mortgagor to recover possession, it appears that there is a balance due from the mortgagee to him, he cannot have judgment and execution for such balance, but must proceed at law.⁶ And when one claiming under the mortgagor has not been made a party to a bill in equity to foreclose a mortgage, so that he is not bound by the proceedings, he cannot maintain ejectment against a purchaser at the foreclosure sale; his only remedy is by a bill to redeem.⁷

The mortgagee in possession after condition broken, until a discharge of the mortgage or a reconveyance, retains the legal estate, although the mortgage debt may have been paid or satisfied, and although he could not maintain an action to recover possession, because no conditional judgment could be entered; yet being in possession, he could not be dispossessed in an action at law. The only remedy against him is in equity.⁸

674. A mortgagor cannot maintain ejectment against the mortgagee in possession so long as there is any question whether the mortgage debt has been paid in full, or there remains any question of account to be settled between the parties.⁹ He must

¹ *Tucker v. Keeler*, 4 Vt. 161.

² *Tucker v. Keeler*, *supra*.

³ *Wright v. Sperry*, 25 Wis. 617; and see *Walthall v. Rives*, 34 Ala. 91, 97.

⁴ *Wilson v. Ring*, 40 Me. 116; *Rowell v. Mitchell*, 68 Me. 21; *Jewett v. Hamlin*, 68 Me. 172; *Rowell v. Jewett*, 69 Me. 293.

⁵ See § 1093; *Parsons v. Welles*, 17 Mass. 419; *Hill v. Payson*, 3 Mass. 559,

560. *Contra*, see *Blanchard v. Kenton*, 4 Bibb (Ky.), 451.

⁶ *Taylor v. Townsend*, 6 Mass. 264.

⁷ *Frische v. Kramer*, 16 Ohio, 125.

⁸ *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390.

⁹ *Beach v. Cooke*, 28 N. Y. 508; *Edwards v. Farmers' Fire Ins. & Loan Co.* 21 Wend. 467; *S. C.* 26 Ib. 541; and see

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resort to a bill to redeem. That is the only way in which an account can be settled; so that even when the mortgagee has in fact received rents and profits from the premises sufficient to satisfy the debt, he can be compelled to apply them to the payment of it only by a suit in equity. Neither can the mortgagor maintain a writ of entry against the mortgagee, or his assignee in possession after condition broken; as before stated, his remedy is in equity only.¹

675. A mortgagor cannot maintain trespass against the mortgagee, or any one holding under him, after entry for condition broken, although the mortgage debt be in fact paid, if it be not released.² Neither can a mortgagor who is not entitled by the terms of the mortgage, on a fair construction of it, to retain possession, maintain trespass against a mortgagee for entering and carrying away a fixture;³ and even before condition broken, when the possession is not either expressly or impliedly secured to the mortgagor by the mortgage deed, he cannot maintain trespass against the mortgagee for entering and harvesting the crops growing upon the land. The gist of the action is unlawful entry; but the entry of the mortgagee in such case is lawful.⁴ Yet the objection that trespass will not lie by a mortgagor against a mortgagee does not hold, when it is shown that the mortgagor is in possession under an agreement which makes him a tenant of the mortgagee.⁵

676. A mortgagor has a perfect right to convey his equity of redemption, or any interest in it; and although he thereby obliges the mortgagee to make his grantees parties to a suit to foreclose the mortgage, his conveyances cannot be considered fraudulent against the mortgagee as tending to hinder and delay him.⁶ Of course the mortgagee is not affected by any act of the mortgagor in passing any right of his in the premises to third persons,⁷ whether by deed, or by confession of judgment,⁸ or otherwise. He cannot bind the mortgagee by any contract or

Dougherty v. Kercheval, 1 A. K. Marsh. (Ky.) 52; *Oldham v. Pfleger*, 84 Ill. 102.

¹ *Woods v. Woods*, 66 Me. 206.

² *Howe v. Lewis*, 14 Pick. (Mass.) 329; *Parsons v. Welles*, 17 Mass. 419; *Taylor v. Townsend*, 8 Mass. 411; *Wilson v. Ring*, 40 Me. 116.

³ *Chellis v. Stearns*, 22 N. H. (2 Fost.) 312. See *Mooney v. Brinkley*, 17 Ark. 340.

⁴ *Gilman v. Wills*, 66 Me. 273; *Lackey v. Holbrook*, 11 Met. (Mass.) 458.

⁵ *Marden v. Jordan*, 65 Me. 9.

⁶ *Hodson v. Treat*, 7 Wis. 263; *Buchanan v. Monroe*, 22 Tex. 537.

⁷ *Ellithorp v. Dewing*, 1 D. Chip. (Vt.) 141; *Coker v. Whitlock*, 54 Ala. 180.

⁸ *Flanagan v. Westcott*, 11 N. J. Eq. (3 Stock.) 264.

deed prejudicial to his title. He cannot create an easement in the land to the prejudice of the rights of the mortgagee.¹ The mortgagor's assignee has no greater rights than the mortgagor himself; and the construction of the mortgage is the same in every respect, whether the mortgagor has conveyed the equity of redemption or not.² Neither can the mortgagor and his grantee, by any subsequent arrangement between themselves, affect the mortgagee's lien, or prevent its operating to the full extent conferred by the mortgage.³

The mortgagor cannot dedicate to public use streets laid out by him upon the mortgaged premises, so as to destroy or release the mortgage lien, or estop the mortgagee from the assertion of it, without the concurrence of the mortgagee, or of the *cestui que trust* under a trust deed clearly established.⁴

3. *His Personal Liability to the Mortgagee.*

677. An admission or recital of indebtedness in a mortgage will not create a personal liability by implication, unless it be express and unequivocal.⁵ The mere recital of the consideration is not sufficient to create such liability.⁶ Lord Chancellor Hardwicke said of such a mortgage, that there did not appear to be any contract, either express or implied, for the payment of this mortgage money.⁷ Although there be, in addition to the recital of consideration, a statement in the condition "that this grant is intended as security for the payment of five hundred dollars and interest," no admission of indebtedness creating a personal liability is implied.⁸ The fact that the mortgage provides for a policy of insurance as additional security, or that it contains a power of sale to be exercised on default, or that it contains the usual clause in regard to the possibility of a surplus after sale, providing that it shall be paid to the mortgagor, does not impart any admission to the other recitals.⁹ A recital that the mortgagor was indebted to the mortgagee in a certain sum, which should have been paid

¹ *Murphy v. Welch*, 128 Mass. 489.

² *Kruse v. Scripps*, 11 Ill. 98; *Anderson v. Strauss*, 98 Ill. 485.

³ *Hartley v. Harrison*, 24 N. Y. 170; *Frost v. Shaw*, 10 Iowa, 491.

⁴ *Walker v. Summers*, 9 W. Va. 533.

⁵ *Shafer v. Bear River & A. W. Mining Co.* 4 Cal. 294.

⁶ *Henry v. Bell*, 5 Vt. 393.

⁷ *Howell v. Price*, 1 P. Wms. 291, 292;

Coleman v. Van Renssalaer, 44 How. (N. Y.) Pr. 368, where several cases are examined, and the case of *Chase v. Ewing*, 51 Barb. (N. Y.) 597, is criticised. See, also, *Culver v. Sisson*, 3 N. Y. 264; *Turk v. Ridge*, 41 N. Y. 201.

⁸ *Severance v. Griffith*, 2 Lans. (N. Y.) 38; *Coleman v. Van Renssalaer*, *supra*.

⁹ *Coleman v. Van Renssalaer*, *supra*.

§ 678.] A MORTGAGOR'S RIGHTS AND LIABILITIES.

on the first day of January preceding, was held to be a covenant to pay money, and that an action of debt would lie for it.¹ A stipulation in a mortgage given to secure a note, that "general execution shall not issue therein," limits the remedy to the mortgaged property.² A stipulation in a mortgage given by a corporation to secure its bonds, that the trustees should sell the property at the request of the holders of \$100,000 of its bonds when due, does not prevent an action by any bondholder upon the bonds after maturity.³

The personal liability of a mortgagor is discharged by the mortgagee's making a partial release of the mortgaged premises to a subsequent purchaser without the mortgagor's consent. The mortgagee, by giving such a release, assumes the risk of the sufficiency of the portion retained to pay the mortgage debt, and cannot call upon the mortgagor to make good the loss. The fact, that after the mortgagee has released a portion of the premises to a subsequent purchaser, the mortgagor joins his wife in executing a release to such purchaser from a mortgage given for a portion of the purchase money to the wife, does not affect the case.⁴

678. In several states it is provided by statute that no mortgage shall imply a covenant for payment of the sum secured; and that when there is no express covenant for such payment, and no separate obligation for the debt, the remedy of the mortgagee is confined to the lands mortgaged.⁵ Under such a statute when the mortgage contains no express covenant to pay the debt secured, and no bond, note, or other separate instrument has been given for it, an action cannot be maintained upon a verbal agreement to pay the debt. The remedy is limited to the land described in the mortgage.⁶

But a note, or bond, or other separate obligation already given for the payment of a debt is not merged or extinguished by giving a mortgage, or a deed of land in the nature of a mortgage, for the same debt.⁷ The mortgage becomes merely collateral se-

¹ *Couger v. Lancaster*, 6 Yerg. (Tenn.) 477.

² *Kennion v. Kelsey*, 10 Iowa, 443.

³ *Philadelphia & Balt. Cent. R. R. Co. v. Johnson*, 54 Pa. St. 127.

⁴ *Townsend Savings Bank v. Munson*, 47 Conn. 390.

⁵ *California*: Civil Code, § 2928.

New York: 2 R. S. 1875, p. 1119.

Oregon: Gen. Laws, 1874, p. 516.

Minnesota: Rev. 1866, c. 40, § 6.

⁶ See §§ 72, 1225; *Van Brunt v. Mismar*, 8 Minn. 232.

⁷ *Liggett v. Bank of Pa* 7 S. & R. (Pa.) 218; *Shaw v. Burton*, 5 Mo. 478; *Williamson v. Andrew*, 4 Har. & M. (Md.) 482.

curity for the payment of the prior obligation. If a new note or bond for the same amount be given, the result may be otherwise,¹ if given with the intention of operating as payment.

The recitals in a mortgage, in regard to the indebtedness secured, may not be evidence that such indebtedness already exists. They may refer to an indebtedness contemplated by the parties, and are always open to explanation.² They may refer to a past indebtedness for which there is no personal liability on the part of the mortgagor, when, of course, the mortgage gives no remedy beyond a resort to the property mortgaged.³ But although the recitals in the mortgage may be competent evidence against the mortgagor to prove the consideration of the note,⁴ yet, when negotiable, the note must be produced before judgment, unless its loss or destruction be shown.⁵

4. *After-acquired Titles and Improvements.*

679. It is a well settled rule of law, that a title subsequently acquired by the mortgagor enures to the benefit of the mortgagee and his assigns by virtue of the covenants in his mortgage, and is subject to foreclosure;⁶ and a subsequent purchaser from the mortgagor under his after-acquired title, having notice of such mortgage, stands in no better position than the mortgagor himself.⁷ Neither can the heirs of the mortgagor claim the benefit of the subsequent title as against the mortgagee, when the mortgagor himself could not do so.⁸ Where one having a claim to land in Missouri, under a Spanish grant, made a mortgage, and afterwards Congress confirmed the claim, it was held that the confirmation enured to the benefit of the mortgagee rather than that of the mortgagor's heirs solely.⁹ In California it is declared by the Code that a title subsequently acquired by

¹ Hall v. Hopkins, 14 Mo. 450.

² Keeler v. Keeler, 11 N. J. Eq. (3 Stockt.) 458; Ellis v. Messervie, 11 Paige (N. Y.), 467.

³ Hone v. Fisher, 2 Barb. (N. Y.) Ch. 559.

⁴ Warner v. Brooks, 14 Gray (Mass.), 107.

⁵ Chewning v. Proctor, 2 McCord (S. C.) Ch. 11.

⁶ §§ 138, 561, 682, 825, 1433, 1656, 1671; Parker v. Jones, 57 Ga. 204; Rank v. Dauphin & Susquehanna Coal Co. 1 Pearson (Pa.), 453; Flynt v. Hubbard,

57 Miss. 471; Wells v. Somers, 4 Bradw. (Ill.) 297; Pratt v. Pratt, 96 Ill. 184; Gibbons v. Hoag, 95 Ill. 45; Rice v. Kelso (Iowa, 1880), 7 N. W. Rep. 3.

⁷ Tefft v. Munson, 63 Barb. N. Y. 31; S. C. 57 N. Y. 97; Hitchcock v. Fortier, 65 Ill. 239; M'Crackin v. Wright, 14 Johns. (N. Y.) 193, 194; King v. Gilson, 32 Ill. 348; Gochenour v. Mowry, 33 Ill. 331; Jones v. King, 25 Ill. 383, 388.

⁸ Somes v. Skinner, 3 Pick. (Mass.) 52, 58; Wark v. Willard, 13 N. H. 389.

⁹ Massey v. Papin, 24 How. 362.

the mortgagor enures to the mortgagee as security, in like manner as if acquired before the execution.¹

One in possession of land under a contract of purchase has a mortgageable interest.² If he makes a mortgage with covenants of warranty, and afterwards acquires the legal title to the property, he is estopped to deny that he had title at the time of the mortgage. A recital in the mortgage, that the premises are the same conveyed to the mortgagor by the person who is the vendor in the contract of sale, will estop him from denying the validity of the mortgage after he has received such a conveyance. The covenants of warranty, in a deed to him by the vendor, relate only to incumbrances, created by him, and not to those created by the grantee; and therefore would not estop the vendor from enforcing the mortgage, although he became the owner of it before the giving of the deed.³

When one who has sold by warranty deed a portion of a parcel of land incumbered by a mortgage becomes a purchaser at a foreclosure sale under the mortgage, such title so acquired to this portion enures to the benefit of his grantee; or, if such grantor allows the mortgage to be foreclosed, and the premises are purchased under a collusive arrangement for his benefit by another person, this purchaser will hold the portion sold with covenant of warranty as trustee for the purchaser of such portion.⁴

But the fiction of relation back of an after-acquired title cannot be so applied as to work an injury to innocent parties. Thus in the ordinary case of a conveyance of land and a simultaneous mortgage for the purchase money, the mortgagee is not affected by any previous conveyance or mortgage which his grantee, the mortgagor, may have placed upon record when he had no title to the premises. The previous conveyance or mortgage may be good between the parties, and may cover the after-acquired title, except as against a mortgage given simultaneously.⁵

Where one mortgaged an undivided two thirds part of land without covenants of title or warranty, and his wife afterwards acquired the other undivided third part, to which he had no title when he gave the mortgage, it was held that the mortgage did

¹ Civil Code, § 2930; Amendments, 1874, p. 260.

² *Crane v. Turner*, 7 Hun (N. Y.), 357.

³ *Judd v. Seekins*, 62 N. Y. 266.

⁴ *Huxley v. Rice*, 40 Mich. 73; S. C. 11 Chicago L. N. 322.

⁵ *Heffron v. Flanigan*, 37 Mich. 274; *Elder v. Derby*, 98 Ill. 228.

not cover the part acquired by the wife, although the husband furnished the money for the purchase.¹

680. A mortgagor cannot, by acquiring a tax title upon the land, defeat the lien of the mortgagee.² It is his duty to pay the taxes, and he is not allowed to acquire a title through his own default.³ The same obligation rests upon one who has purchased the land of the mortgagor. When the taxes are paid by one who has merely a lien upon the land, there is of course no obligation upon him to pay the taxes; and although he may acquire the tax title for the protection of his own lien, he is not allowed to set up that title to defeat a prior lien. The land is regarded as a common fund for the payment of both liens, and equity regards it as an act of fraud for him to acquire a title to the land for an inconsiderable sum, and use it to destroy the claim of the prior mortgagee to the land.⁴

It is a general rule that any one interested in land with others, all deriving their title from a common source, will not be permitted to acquire an absolute title to the land by a tax deed, to the injury of the others. The mortgagor, or any holder of the equity standing in his place as a purchaser, or a second mortgagee, cannot set up such title against the prior mortgagee.⁵ The taking of the tax title in such case is regarded *prima facie* merely as a redemption of the land from the tax sale. But a mortgagor for purchase money, who has acquired a tax title which the mortgagee by his covenants was bound to remove, may set up as an offset in a foreclosure the amount he was compelled to pay for the title.⁶

But this principle does not prevent a mortgagor's holding the property as a tenant at will of another who has acquired a tax title to the mortgaged property; for a tenant at will has no estate which is assignable, and the mortgagee cannot gain by estoppel any greater right than the tenant could assign; and of course the mortgagee would acquire no right as against the holder of the tax title.⁷

¹ McClure v. Holbrook, 39 Mich. 42.

² §§ 77, 713, 714; Fuller v. Hodgdon, 25 Me. 243; Fair v. Brown, 40 Iowa, 209; Stears v. Hollenbeck, 38 Iowa, 550; Porter v. Lafferty, 33 Iowa, 254; Allison v. Armstrong (Minn. 1881), 9 N. W. Rep. 806.

³ Dayton v. Rice, 47 Iowa, 429; Annelly v. De Saussure, 12 S. C. 488, 510.

⁴ Fair v. Brown, 40 Iowa, 209; Renshaw v. Stafford, 30 La. Ann. 853.

⁵ Smith v. Lewis, 20 Wis. 350; Avery v. Judd, 21 Wis. 262.

⁶ §§ 1502-1504; Eaton v. Tallmadge, 22 Wis. 526.

⁷ Coughlin v. Gray, 131 Mass. 56

§§ 681, 681 a.] A MORTGAGOR'S RIGHTS AND LIABILITIES.

As already noticed, the mortgagee may acquire and maintain title to the premises paramount to the mortgagor, by purchase at a sale for taxes or under a prior judgment lien.¹

If a mortgage containing covenants of warranty be foreclosed, the mortgagor, by buying the property at a tax sale for delinquent taxes on the land existing at the time of the mortgage, cannot defeat the title of the mortgagee, or of the purchaser under the foreclosure.²

681. Improvements made with the consent of the owner, upon land subject to a mortgage, by one who has notice of it, become subject to the mortgage in the same manner as if they had been made by the mortgagor himself.³ If a corporation having the power to take the land by condemnation make improvements before exercising this power, the mortgagee cannot be deprived of the benefit of the improvements by allowing the corporation to redeem the land on paying the value of the land when it took possession.⁴ It is negligence on the part of the corporation to proceed with improvements without first either obtaining a release of the mortgage, or condemning the interest of the mortgagee if it has that power. The corporation stands in the relation of a purchaser with notice of the mortgage, it being duly recorded, and it cannot have an advantage as to improvements which the mortgagor would not have had. There is no good reason for discriminating in its favor. To give a purchaser, with such notice, this right, would enable him to obtain from the mortgagee, by means of the improvements, a compulsory release at the value of the land at the time of taking possession.⁵

The mortgagor is not entitled, as against the mortgagee, to be allowed for improvements made by him on the mortgaged property,⁶ unless there be a covenant in the mortgage for such allowance in case of foreclosure.⁷

Neither have persons furnishing labor and materials for such improvements any claim upon the mortgagee, without proof of a direct or implied promise on his part.⁸

681 a. If land subject to mortgage be taken in the exercise of the right of eminent domain, as, for instance, for the

¹ § 672; *Sturdevant v. Mather*, 20 Wis. 576.

² *Porter v. Lafferty*, 33 Iowa, 254.

³ *Frierson v. Blanton*, 1 Bax. (Tenn.) 272.

⁴ *Booraem v. Wood*, 27 N. J. Eq. 371.

⁵ *Booraem v. Wood*, *supra*.

⁶ *Childs v. Dolan*, 5 Allen (Mass.), 319; *Wharton v. Moore*, 84 N. C. 479;

Baird v. Jackson, 98 Ill. 78.

⁷ *Phillips v. Holmes*, 78 N. C. 191.

⁸ *Holmes v. Morse*, 50 Me. 102.

right of way of a street or for the location of a railroad track, the mortgagee should be made a party to the proceeding for the taking of the land, and the damages awarded should be paid to him, otherwise he may recover the same by action against the person or corporation entering upon the land.¹ In Massachusetts a different course is pursued under statutes providing for the taking of land for public purposes. The damages are assessed to the owner of the equity of redemption without regard to mortgages incumbering the land.² The proceeding is in the nature of a proceeding *in rem* against the land. A mortgagee not in possession has no claim for compensation for an injury to the land when lawfully used by any party. As to third persons the interests of mortgagor and mortgagee are not joint, but the mortgagor is the owner. They cannot join or be joined in an application to assess damages for land taken for public uses. The mortgagor alone can make a surrender. In equity the damages assessed to the owner of the land would be deemed the land, and the mortgagee may follow the money in the mortgagor's hands, or prevent its going into his hands. The burden of proof is then upon him to show to what extent he has a claim upon the funds; and that question would then be litigated between the parties in interest, and not at the cost of the taker of the land.³

In Connecticut also the mortgagor is regarded as the owner of mortgaged land within the meaning of a city charter which provides that compensation shall be made to the owner of land taken by the common council for streets; so that, if notice be regularly

¹ § 708; *Platt v. Bright*, 29 N. J. Eq. 128; S. C. 31 Ib. 81; *Bright v. Platt*, 32 N. J. Eq. 362; *State v. Easton & Amboy R. R. Co.* 36 N. J. L. 181; *Coe v. N. J. Midland Ry. Co.* 28 N. J. Eq. 27; *North Hudson County R. R. Co. v. Booraem*, Ib. 450; *Wilson v. European & N. A. Ry. Co.* 67 Me. 358; *Warwick Inst. for Savings v. City of Providence*, 12 R. I. 144; S. C. 7 Reporter, 121; *Pettis v. Providence*, 11 R. I. 372; *Trogden v. Winona & St. Peter R. R. Co.* 22 Minn. 198; *Kennedy v. Milwaukee & St. Paul Ry. Co.* 22 Wis. 581; *Severin v. Cole*, 38 Iowa, 463; *Stewart v. Raymond R. R. Co.* 15 Miss. (7 S. & M.) 568; *Michigan Air Line Ry. Co. v. Barnes*, 40 Mich. 383; S. C. 44 Ib. 222; *Colehour v. State Sav. Inst.* 90 Ill. 152.

² *Breed v. Eastern R. R. Co.* 5 Gray, 47, note. And see *Whiting v. New Haven*, 45 Conn. 303; S. C. 7 Reporter, 42. This inequitable rule was changed by Acts 1881, c. 110, whereby damages are assessed to the mortgagee to the extent of his interest, and the balance to the mortgagor, as in case of lands taken by railroad companies under Act of 1874, c. 372, § 110.

³ *Farnsworth v. City of Boston*, 126 Mass. 1, 9; S. C. 19 Alb. L. J. 118; *Barnstable Sav. Bank v. Boston*, 127 Mass. 254; *Read v. Cambridge*, 126 Mass. 427; *Pond v. Eddy*, 113 Mass. 149; *Paine v. Woods*, 108 Mass. 160.

given and compensation made to the mortgagor, the city is not liable to the mortgagee.¹

If a mortgage contain a reservation in favor of the mortgagor of any benefits that might accrue from the taking of any part of the land by the city for a street, with the right to receive directly from the city the damages that might be assessed therefor, and such damages are less than the assessments made upon the remaining part of the land for the improvements resulting to that, the mortgagor cannot claim the compensation without paying the assessment.²

682. Mortgagor estopped to deny his title.—A mortgagor by a mortgage containing the usual covenants of seisin and warranty is estopped to deny the title of the mortgagee,³ and he is as much estopped to deny the title of a subordinate mortgagee as to deny that of the first.⁴ He is not only estopped from claiming title himself, but also from setting up a prior mortgage made by himself to another, as an outstanding title.⁵

Where a mortgage intended for the security of the school funds was executed to the commissioner of that fund, after the office was abolished, it was held that the mortgagor was estopped to deny the official character of the grantee, and that effect should be given the instrument.⁶

The mortgagor in such case will not be heard to say, in contradiction of his covenant of warranty, that he had not title at the date of the conveyance, or that it did not pass to his mortgagee by virtue of his deed.⁷ Where an owner of land made a second mortgage with covenants of warranty, and the first mortgagee entered and authorized the mortgagor to occupy, and died intestate, leaving the mortgagor his heir, it was held that the mortgagor was not entitled to possession as against the second mortgagee: either under the authority of the first mortgagee, because such authority was revoked by his death; or by descent from the

¹ *Whiting v. New Haven*, 45 Conn. 303; and see *Mills v. Shepard*, 30 Conn. 98, 101; *Norwich v. Hubbard*, 22 Conn. 587.

See article on Road-Opening through Mortgaged Lands, by L. T. Yale, 21 Alb. L. J. 25.

² *United States Mortgage Co v. Gross*, 93 Ill. 483.

³ *Gross v. Robinson*, 21 Conn. 379; *Skelton v. Scott*, 18 Hun (N. Y.), 375.

⁴ *Wires v. Nelson*, 26 Vt. 13; *Bailey v. Lincoln Academy*, 12 Mo. 174.

⁵ *Fisher v. Milmine*, 94 Ill. 328.

⁶ *Floyd County v. Morrison*, 40 Iowa, 188; *Franklin v. Twogood*, 18 Iowa, 515.

⁷ See §§ 561, 1483; *Tefft v. Munson*, 57 N. Y. 79; *Usina v. Wilder*, 58 Ga. 178.

first mortgagee, because he was estopped by the covenants of his mortgage.¹

683. The doctrine of equitable estoppel is also applied against a mortgagor who has induced another to take an assignment of the mortgage from the holder of it, upon the representation that it is a good and valid security, to prevent his assailing its validity in the hands of such assignee. Having by word or act induced another to part with his money for the security, he is not allowed to repudiate the truth of his representation, and escape the payment of the obligation, by showing as between himself and the former holder of it that it was invalid.² But such representations made by one of several mortgagors estops him alone and not the others.³ And so if an owner of land represents to a creditor that it belongs to another, and induces such creditor to take a mortgage from that person, and to extend the time of payment of the debt, he is estopped to claim the land as against the lien of the mortgage.⁴

One who has made a mortgage to secure notes payable to his own order, which he has delivered to the mortgagee without indorsement, thereby admits that the notes are valid securities for the payment of money.⁵

Only the parties to a mortgage, and those in privity with them, are bound by or can take advantage of an estoppel created by it.⁶ That the estoppel cannot bind others is apparent enough, and it is only a little less apparent that one is not bound to all the world to make good what he has said in his deed to the other party to it, even if others have relied upon his recital.⁷

5. *Waste by Mortgagor.*

684. *Injunction against.* — A mortgagor in possession, who is about to cut timber, remove fixtures, or commit other waste on the land, to an extent calculated to render the security inade-

¹ *Lincoln v. Emerson*, 108 Mass. 87.

² *Bush v. Cushman*, 27 N. J. Eq. 131, per Van Fleet, V. C. "No reference to books is necessary in vindication of a principle so clearly fundamental in every system of laws framed to promote justice. I refer to the following authorities simply to show how the doctrine has been applied": *Martin v. Righter*, 10 N. J. Eq. (2 Stockt.) 510, 525; *Lee v. Kirkpatrick*, 14 N. J. Eq. 264, 267; *Den v. Baldwin*,

21 N. J. L. (1 Zab.) 395, 403; *Cable v. Ellis*, 86 Ill. 525.

³ *Cable v. Ellis*, *supra*; *Smyth v. Munroe*, 84 N. Y. 354; *Smyth v. Knickerbocker L. Ins. Co.* 84 N. Y. 589.

⁴ *Parlin v. Stone*, 1 McCrary, 443.

⁵ *Hartwell v. Blocker*, 6 Ala. 581.

⁶ *Bigelow on Estoppels*, 269.

⁷ *Mershon v. Mershon*, 9 Bush (Ky.), 633.

quate, may be restrained by injunction; and it is not necessary to allege or prove his insolvency.¹ Whether the mortgage be regarded as passing the legal estate, or as giving merely a lien for the debt, seems not to be regarded by the courts in giving this remedy against impairing the security.² That a mortgagee has the legal estate may be one ground for the interference of a court of equity in this way; but the right of the mortgagee to be protected in his security is a ground for such interference, whether he has the legal title or not.

In order to obtain an injunction it is not generally necessary to show that the threatened injury is literally irreparable. It is sufficient if there be no adequate remedy by action for damages.³ Although the trespasser be a person of undoubted solvency, yet the trespass may produce inconveniences and perplexities for which a jury could not, under the rules of law, give full compensation.⁴ Mere inconvenience, though the damage be slight, may under some circumstances constitute irreparable injury within the rule of equity.⁵

In Connecticut it is held that until a decree of foreclosure, and the expiration of the time limited for redemption, the mortgagor is not liable in an action at law for waste, in cutting and carrying away wood and timber, or fixtures, or parts of buildings; but that the mortgagee's remedy is by an injunction in equity, to restrain the mortgagor from impairing the security.⁶ In New

¹ *Eden on Injunction*, p. 119; 2 *Story Eq. Jur.* § 915; *Goodman v. Kine*, 8 Beav. 379; *Usborne v. Usborne*, Dick. 75; *Hippealey v. Spencer*, 5 Madd. 422; *Humphreys v. Harrison*, 1 Jac. & W. 561; *Bagnell v. Villar*, L. R. 12 Ch. D. 812; *Harris v. Bannon*, 78 Ky. 568; *Adams v. Corriston*, 7 Minn. 456; *Fairbank v. Cudworth*, 33 Wis. 358; *Scott v. Webster*, 50 Wis. 58; *Taylor v. Collins*, 51 Wis. 123; *Dorr v. Dudderar*, 88 Ill. 107; *Coker v. Whitlock*, 54 Ala. 180. In the latter case, a bill to enjoin the removal of rails half decayed, and the scattered planks of a building of little value, was dismissed because it did not appear that the mortgage security or the permanent value of the property would be impaired by the removal. In *Bunker v. Locke*, 15 Wis. 635, the complaint averred the insolvency of the mortgagor, but the necessity of the averment was not passed upon.

In *Robinson v. Russell*, 24 Cal. 467, the acts complained of were the removal of fruit from trees, and of growing nursery stock; and the court held the averment of the mortgagor's insolvency to be necessary, on the ground that the mischief was not irreparable. In *Am. Trust Co. of N. J. v. North Belleville Quarry Co.* 31 N. J. Eq. 89, a quarry company was restrained from removing or disposing of stone quarried on the mortgaged lands after a decree of foreclosure.

² *Brady v. Waldron*, 2 Johns. (N. Y.) Ch. 148; *Salmon v. Clagett*, 3 Bland Ch. (Md.) 125; *Nelson v. Pinegar*, 30 Ill. 473.

³ *Kerr on Injunctions*, 2d ed. pp. 16, 17.

⁴ *State Savings Bank v. Kercheval*, 65 Mo. 682.

⁵ *Kerr on Injunctions*, 2d ed. pp. 16, 17.

⁶ *Cooper v. Davis*, 15 Conn. 556.

York, also, the mortgagee has no property in trees cut down by the mortgagor, such as will enable him to maintain trover against him.¹

In states where the possession of the mortgaged premises is by statute assured to the mortgagor until foreclosure and the mortgage is a mere lien, the mortgagee has no right to take possession of timber cut therefrom, whether it be upon the premises or not; nor can he maintain an action to recover the possession of such timber or for any fixture severed from the realty.² He may, perhaps, have an action for damages against a person who wrongfully and knowingly impairs his security; but even this remedy is denied by some courts;³ and at best this is an uncertain remedy as compared with that afforded by an injunction restraining the commission of waste; or as compared with the remedy afforded by actions at law for the recovery of the property removed from the mortgaged premises,⁴ in states where the mortgagee has the legal title and right of possession.⁵

A vendee in possession under a contract of purchase occupies a like position to that of a mortgagor, and may be enjoined in the same manner from committing waste.⁶

Not only may an injunction against waste of the mortgaged property be had on the application of the mortgagee, but also upon the application of any one who stands in the relation of a surety of the mortgage debt, and who is either liable personally for its payment, or whose property is liable, by reason of being embraced in the mortgage. He has a right to protect the principal fund, and to save himself from consequent loss.⁷ It may also be had upon application by the purchaser at a foreclosure sale, pending its confirmation.⁸

Instead of permanently enjoining a mortgagor from cutting timber, the court may under some circumstances allow him to cut it, upon his securing the mortgagee for the value of it; as, for instance, where pine woodland had been burnt over, and it was proper, both for the permanent benefit of the estate and in order to save the burnt wood, that this should be cut off, the mort-

¹ *Peterson v. Clark*, 15 Johns. 205.

² *Vanderslice v. Knapp*, 20 Kans. 647.

³ *Alexander v. Shonyo*, 20 Kans. 705.

⁴ *Adams v. Corrison*, 7 Minn. 456.

⁵ §§ 453-455.

⁶ *McCaslin v. State*, 44 Ind. 151;
Thompson v. Heywood, 129 Mass. 401;

Kimball v. Darling, 32 Wis. 675; *Taylor v. Collins*, 51 Wis. 123.

⁷ *Knarr v. Conaway*, 42 Ind. 260, 265;

Johnson v. White, 11 Barb. (N. Y.) 194.

⁸ *Mut. L. Ins. Co. v. Nat. Bank of Newburgh*, 18 Hun (N. Y.), 371; *Malone v. Marriott*, 64 Ala. 486.

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gagor was allowed to proceed to do so, after giving security for the value of the wood, as fixed by a reference ordered by the court.¹

The court in a foreclosure suit may after judgment and pending confirmation of the sale restrain the mortgagor, on the petition of the purchaser, from committing waste; otherwise the mortgagor might take away from the control of the court the very thing upon which it had adjudicated.²

685. An injunction will not ordinarily be extended to restrain the removal of timber already cut. It then ceases to be part of the realty, and being converted into personal property, trover will lie for it. To prevent a multiplicity of suits, the courts, in granting an injunction to stay the commission of waste, have sometimes as an incident to that decreed an account for waste already done.³ "It would seem, then, to be a stretch of jurisdiction, to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. . . . There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber."⁴

686. It is not the duty of a mortgagee to enjoin waste, although it is his right, or the right of a purchaser of the equity of redemption of a part of the mortgaged property, to enjoin the committing of waste; and a subsequent mortgagee, or a purchaser of a part of the mortgaged property, cannot require an account from the mortgagee of waste committed upon other portions of the property by the mortgagee or others, and an allowance of the damage done in part satisfaction of the mortgage debt.⁵ Such subsequent mortgagee or purchaser, standing in the position of a surety of the mortgage debt, might himself obtain such injunction.

687. Trespass for waste may be maintained by a mortgagee

¹ *Brick v. Getsinger*, 5 N. J. Eq. (1 Halst.) 391.

² *Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 568.

³ *Jesus College v. Bloom*, 3 Atk. 262; *Garth v. Cotton*, 1 Ves. 528.

⁴ *Watson v. Hunter*, 5 Johns. (N. Y.) Ch. 169, per Kent, Chancellor.

⁵ *Knarr v. Conaway*, 42 Ind. 260; *Coleman v. Smith*, 55 Ala. 368.

having the legal estate, though not in actual possession, but entitled to it after condition broken. The cutting of wood or timber, or the committing of other waste upon the premises, is regarded as an injury to the freehold rather than to the possession. The effect of the mortgage is to vest the legal estate at once in the mortgagee, and the right of possession also immediately passes, unless the mortgagor by stipulation retains the right of possession until condition broken; and in this case, after condition broken, the right of possession immediately accrues to the mortgagee.¹ As an incident to the right of possession follows the right to sue in trespass for an injury to the freehold by strip and waste.² The possession of the mortgagor is not adverse to the possession of the mortgagee. A second mortgagee may maintain the action, upon a discharge of the first mortgage subsequently to the commission of the waste,³ or upon a waiver by the first mortgagee of his right of action.

It is said that trespass against the mortgagor for waste will lie for acts done while he was in possession, if the action be brought by the mortgagee after he has entered, — the law by a kind of *jus post liminii* supposing the freehold all along to have continued in him.⁴ After a mortgagee has entered for condition broken, he may maintain an action for waste done by a tenant for life in cutting trees before the entry, — and before any breach of condition; and it is no defence for the tenant that the waste, which consisted in cutting down trees on the land, was committed by a stranger, who was a mere trespasser.⁵

If the mortgagor, after condition broken, cut timber and leave it upon the mortgaged premises until the mortgagee takes possession, having no title to it as against the mortgagee, he is liable in trespass *quare clausum*, or in trover, or in an action on the case in the nature of waste, for removing it.⁶ If, under such cir-

¹ Page v. Robinson, 10 Cush. (Mass.) 99; Hapgood v. Blood, 11 Gray (Mass.), 400. In Waterman v. Matteson, 4 R. I. 539-543, the court seemed to think that trespass, which is an action appropriate only to an injury to the possession, could not be maintained by a mortgagee who has never had possession. See § 688.

² Sanders v. Reed, 12 N. H. 558; Smith v. Moore, 11 N. H. 55; Pettengill v. Evans, 5 N. H. 54; Stowell v. Pike, 2 Me. 387; Smith v. Goodwin, 2 Me. 173;

Linscott v. Weeks, 72 Me. 506; Harris v. Haynes, 34 Vt. 220; Mitchell v. Bogan, 11 Rich. (S. C.) 686; Cole v. Stewart, 11 Cush. (Mass.) 181; Butler v. Page, 7 Met. (Mass.) 40.

³ Sanders v. Reed, *supra*.

⁴ Pettengill v. Evans, 5 N. H. 54.

⁵ Fay v. Brewer, 3 Pick. (Mass.) 203.

⁶ Hagar v. Brainerd, 44 Vt. 294; Moore v. McGuire, 4 Vt. 327; Lull v. Mathews, 19 Vt. 322; Langdon v. Paul, 22 Vt. 205.

cumstances, the wood be attached as the property of the mortgagor and sold upon execution, the purchaser acquires no more title than the mortgagor had, and he cannot be compelled to pay the price bid for it.¹

But before the condition of a mortgage is forfeited, the mortgagee is not entitled to an action of waste against the mortgagor. Waste is an injury to the inheritance, and an action for waste is given to him who has the inheritance in expectancy. The interest of the mortgagee, especially before the mortgage is forfeited, is contingent, and may be defeated by payment; and is not such an interest as will sustain the action.²

688. In like manner replevin may be maintained by the mortgagee for timber cut or fixtures removed from the premises, after condition broken, against the mortgagor in possession, when the act results in wrongful waste and in substantial diminution of the mortgage security. The wrongful act of the mortgagor, in severing the timber and wood from the freehold, ought not to deprive the mortgagee of his right to it under the mortgage as security for the debt. The wrong-doer should derive no advantage from his wrongful act.³ The principle is, that property severed from the realty so as to become a chattel belongs to the legal owner of the land, who is in such case the mortgagee; and that the mortgagee having such interest in the land, and the actual or constructive possession, may maintain an action for the value of the property severed, or an action for the specific chattels. This is the common law doctrine.⁴ There would seem to be no reason why replevin will not lie wherever trover could be maintained.

A mortgagee may maintain replevin for a house severed from the mortgaged premises without his consent, if the house has not become attached to and a part of other realty. Even after it has been so attached to other realty, if it afterwards be severed from that, before the mortgage debt is discharged, the mortgagee may regain it by replevin.⁵

Under a different view of the nature of a mortgage, a mortgagee cannot maintain replevin for a house built by the mortgagor after the making of the mortgage, and sold and removed

¹ Lull v. Matthews, 19 Vt. 322.

⁴ Holland v. Hodgson, L. R. 7 C. P.

² Peterson v. Clark, 15 Johns. (N. Y.) 328.

205.

⁵ §§ 143, 453; Dorr v. Dudderar, 88

³ Waterman v. Matteson, 4 R. I. 539. Ill. 107.

See §§ 453-455.

by a purchaser of the premises before foreclosure. "If such an action can be maintained," say the court, "a mortgagee may recover from the purchasers all the timber, stone, or other property severed from the realty and sold by the mortgagor, though its value may exceed the mortgage debt an hundred fold, and however ample the security may remain; although it is quite clear on principle and authority that the purchaser of property so removed by the mortgagor cannot be liable in an action for the waste beyond the actual loss the mortgagee thereby sustains."¹

Even in New Jersey, where a mortgage is regarded as a conveyance in fee simple, but still as conferring the legal estate only for the purpose of securing the debt, a different view of the mortgagee's remedy is taken in such case. The only use the mortgagee can make of his legal estate before foreclosure or entry is to assert and maintain a right to the possession of the land until the debt is paid. He cannot insist upon a remedy the enforcement of which pertains to the general legal ownership of the land. Neither is he regarded as having a constructive possession of the premises after condition broken while the mortgagor is in actual possession; therefore the mortgagee is denied any remedy founded upon possession.² But although the mortgagee cannot maintain replevin for the property removed, he may maintain an action at law, in the nature of an action on the case, against the wrongdoer for the injury inflicted. Although this is not an effectual remedy if the defendant be irresponsible, yet it is declared that this is a risk the mortgagee has assumed.³

689. The mortgagee, being entitled to the timber cut upon the mortgaged premises, may claim it in the hands of a purchaser from the mortgagor.⁴ Though not in possession, he may retake the property itself from such purchaser, or he may recover the value of it from him in an action of trover.⁵ After he has notified the purchaser of his right to the property, and forbidden his paying the price of such timber to the mortgagor, the latter cannot maintain an action for such price.⁶

¹ Clark v. Rayburn, 1 Kans. 281.

² Kircher v. Schalk, 39 N. J. L. 335.
See §§ 453-455.

³ Kircher v. Schalk, *supra*.

⁴ Frothingham v. McKusick, 24 Me. 403; Stowell v. Pike, 2 Me. 387; Gore v. Jenness, 19 Me. 53; Waterman v. Mat-

son, 4 R. I. 539; Adams v. Corrison, 7 Minn. 456; Bussey v. Page, 14 Me. 132.

⁵ Searle v. Sawyer, 127 Mass. 491; Wilbur v. Moulton, 127 Mass. 509; Langdon v. Paul, 22 Vt. 205; Smith v. Moore, 11 N. H. 55.

⁶ Wilmarth v. Bancroft, 10 Allen (Mass.), 348.

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The mortgagee may, however, either directly or indirectly, waive his right to the timber severed from the land, and when that is the case the purchaser cannot resist paying the price of it to the mortgagor, from whom the purchase was made. The fact that the mortgagee acts for the mortgagor as his agent in collecting payment for the timber is a waiver of his own right.¹

A mortgagee, though not in possession, may maintain an action of tort in the nature of trover against a person whose servant unlawfully takes turf from the mortgaged land, and does it in his master's business.

In New York, and probably in other states where the same doctrine in relation to the nature of mortgages prevails, it is held that the title to the wood cut from mortgaged land vests in one who has purchased and cut it without knowledge of the lien; and although the security is impaired, and the mortgagee has after the cutting notified the purchaser not to pay the purchase money to the mortgagor, he cannot recover it in a suit against the purchaser after he has so paid it regardless of the request.² It is only when the purchaser cuts the wood with knowledge of the lien, and with the intent to injure the holder of it, that he is liable to him for the injury done the security.⁴

Mortgaged property which has been taken from the mortgaged lands may be sold under a foreclosure sale without first recovering possession of it by an action at law. Thus, timber, posts, rails, and cord-wood made from trees on mortgaged premises, fraudulently cut by the mortgagor and removed to neighboring lands, may be sold upon foreclosure to make up a deficiency in the mortgage debt, after a sale of the land.⁵

690. The mortgagee has no right of action after payment.

If the mortgagee purchase the mortgaged premises at the foreclosure sale, for the full amount then due on the mortgage, he has no claim to logs previously cut upon the premises.⁶ When he has been paid his debt his right of action is gone, although the trespass upon the property was committed before the payment.⁷

691. The mortgagee must account upon the mortgage debt for whatever sum he may recover from the person who has cut

¹ *Kimball v. Lewiston Steam Mill Co.*
55 Me. 494.

² *Wilbur v. Moulton*, 127 Mass. 509.

³ *Wilson v. Maltby*, 59 N. Y. 126.

⁴ *Van Pelt v. McGraw*, 4 N. Y. 110.

⁵ *Higgins v. Chamberlin*, 32 N. J. Eq.
566.

⁶ *Berthold v. Holman*, 12 Minn. 335;
Corbin v. Reed, 43 Iowa, 459.

⁷ *Kennerly v. Burgess*, 38 Mo. 440.

timber upon the mortgaged estate, or for whatever he may receive from the sale of the timber itself, when he has taken possession of that.¹

692. If the mortgagor have license to cut timber, of course such cutting is not waste, and such license may be implied from the terms of the mortgage, as in the case of one given as security for a note payable in wood, in which it was provided that the mortgagor was "not to cut wood or timber upon the said estate except for the payment of said note, to reduce the value below the amount secured with interest annually." Even after a breach of the condition of the mortgage, the mortgagor might cut timber to any extent, provided he did not so strip the land as to leave it of less value than the amount then due upon the note.²

Whether the cutting of wood and timber is wrongful or not depends upon the question whether a license to do the act has been expressly given or may be fairly implied from the circumstances of the case; and this is a question for the jury.³

Where the mortgagee has waived his right to the timber cut by the mortgagor, or has directly assented to his cutting it, or his assent may be fairly inferred from the circumstances of the case, he cannot afterwards claim it or treat the mortgagor as a trespasser.⁴

693. The court will not allow an abuse of a privilege of cutting wood and timber from the mortgaged premises, but will restrain the exercise of it to an extent calculated to render the

¹ *Guthrie v. Kahle*, 46 Pa. St. 331.

² *Ingell v. Fay*, 112 Mass. 451. For a case where the mortgagee had license to cut a certain amount of timber and was held to account for timber cut in excess of that amount, see *Scott v. Webster*, 50 Wis. 53.

³ *Searle v. Sawyer*, 127 Mass. 491; *Smith v. Moore*, 11 N. H. 55; *Page v. Robinson*, 10 Cush. (Mass.) 99.

"If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty which would not be wrongful, because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm with a clause permitting him to retain posses-

sion, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case it is clear that he is entitled to take the annual crops, and wood for fuel. *Woodward v. Pickett*, 8 Gray, 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and is good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties." Per Morton, J., in *Searle v. Sawyer*, 127 Mass. 491, 494.

⁴ *Smith v. Moore*, 11 N. H. 55.

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premises an insufficient security.¹ But there must be an allegation in the bill, and proof that the land would not be an adequate security for the payment without the timber.²

No authority to commit waste by cutting off wood and timber can be implied from the fact that the land was purchased by the mortgagor for improvement for villa sites, nor from the price paid for it.³

If a mortgagee permit the owner of the land to sell the wood under an agreement that the purchase price shall be paid to him, and the purchaser, without knowledge of the lien, goes on to cut the wood, he is then under no legal duty to defer, at the mortgagee's request, paying the price of the wood to the owner, and, no legal proceedings having been taken to prevent it, payment to him is a valid discharge of the debt.⁴

694. The mortgagor in possession of a farm, after condition broken, may cut wood for his own fires, for repairing fences, and for other purposes, according to the well known and existing usages of ordinary husbandry.⁵ "The well known and existing usages as to the mode of carrying on a farm to which a wood lot is attached, both as to the cutting of suitable wood for fires, and of timber for repairing fences, are not to be overlooked, and they may furnish justification for such acts."⁶ And if he cut wood in good faith for his own use as fire-wood, before condition broken, as he may rightfully do, the title to it is not changed by the subsequent foreclosure of the mortgage while the wood still remains upon the ground, and the mortgagor may remove it without being held in trover for so doing.⁷

695. Action for injury to the property. — The mortgagor, or the owner of the equity, has no more right than a stranger to impair the security of the mortgagee by removal of buildings or fixtures, thereby causing substantial and permanent injury and depreciation to the security. The mortgagee's right of action in such case is based upon his interest in the property; and the damages are measured by the extent of the injury, and not by

¹ *Emmons v. Hinderer*, 24 N. J. Eq. 39; *Ensign v. Colburn*, 11 Paige (N. Y.), 503; *Scott v. Webster*, 50 Wis. 53.

² *Van Wyck v. Alliger*, 6 Barb. (N. Y.) 507, 511, and cases cited; *Buckout v. Swift*, 27 Cal. 433; *Hill v. Gwin*, 51 Cal. 47.

³ *Coggill v. Millburn Land Co.* 25 N. J. Eq. 87.

⁴ *Wilson v. Maltby*, 59 N. Y. 126.

⁵ *Hapgood v. Blood*, 11 Gray (Mass.), 400; *Page v. Robinson*, 10 Cush. (Mass.) 99, 102; *Smith v. Moore*, 11 N. H. 55, 62.

⁶ *Per Dewey, J., in Hapgood v. Blood, supra.*

⁷ *Wright v. Lake*, 30 Vt. 206.

the extent of the insufficiency of the remaining security. Although the property in its damaged condition be of sufficient value to satisfy the mortgage debt, he is entitled to damages all the same. It is his right to hold the entire mortgaged estate for the full payment of his demand.¹

One holding land, both as mortgagee and as grantee of the mortgagor, is liable for waste to a second mortgagee.²

If a prior mortgagee settle in good faith and for a reasonable sum paid in satisfaction for the injury, the claim of a subsequent mortgagee is discharged, and his right of action for the injury barred; but it is competent for him to show that the articles so removed were of greater value than the sum paid in satisfaction to the first mortgagee; and also to show that the damage caused the premises was greater than that sum.³

When fixtures are severed from the mortgaged property by the mortgagee without the consent of the mortgagor, in a state where the rule is that the title and right of possession remain in the mortgagor until foreclosure, the mortgagor may recover damages for the trespass committed by the persons who removed the fixtures. The fact that the mortgage was afterwards foreclosed and the property bought by the mortgagee, and conveyed to him by the sheriff, does not affect the case; because the fixtures having been removed, they are freed from the operation of the mortgage, and the foreclosure does not affect them. The title to the fixtures was in the mortgagor at the time they were severed from the freehold, and he is entitled to recover their value.⁴

A mortgagee may have an action for injury done to the mort-

¹ §§ 453-455, 721; *Byrom v. Chapin*, 113 Mass. 308; *Gooding v. Shea*, 103 Mass. 360; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; *King v. Bangs*, 120 Mass. 514.

In Connecticut it is provided by statute that any person claiming the right of possession, whether as mortgagor or otherwise, to any land subject to any mortgage duly executed and recorded, who shall, while such mortgage is unreleased of record, impair the value of the premises subject to such mortgage by removing, destroying, or injuring any building or fixture on the land so mortgaged, or by cutting wood not necessary for fire-wood to be used on said land by the family of the mortgagor, or by any other means, without the consent in writing of whoever

appears of record to be the owner of or interested in such mortgage, and with intent to defraud any owner or person interested in such mortgage, or with intent to lessen the value of the property subject to such mortgage, to the injury of any person owning or interested in such mortgage, shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprisonment not exceeding three months, or by both. Acts 1879, p. 392.

² *Scott v. Webster*, 50 Wis. 53.

³ *Byrom v. Chapin*, 113 Mass. 308.

⁴ *Hill v. Gwin*, 51 Cal. 47. The fixtures removed were certain stamps, part of a stamp battery, and a mortar block belonging to a mill.

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gaged property by a mob. If he has foreclosed his mortgage after the damage was done, and has himself become the purchaser at the sale, in order to recover he must prove not only the injury to the property, but his own loss of a part of the mortgage debt in consequence.¹

In those states where a mortgage is a lien merely, and does not vest title to the land in the mortgagee, the rule is that the damages which the mortgagee may recover in trespass on the case are limited to the amount of injury to the mortgage as a security.² In some cases it has been held to be necessary to show that the mortgagor is insolvent, or not personally responsible for the debt, before a suit for damages can be sustained.³

696. When the mortgagee has not such possession of the mortgaged premises as will enable him to maintain trespass for a wrongful or fraudulent injury to the premises whereby his security is impaired, he may have an action on the case against the mortgagor or other person who has committed the wrongful act.⁴ Thus a purchaser from the mortgagor, who, with knowledge of the mortgage and of the mortgagor's insolvency, takes away the fences and cuts down and carries away valuable timber, is liable to such action; and, in order to sustain the action, it is not necessary to show that the defendant's motive was to injure the plaintiff's security. He is presumed to intend the necessary consequences of his acts.⁵ To sustain such action it must be alleged and proved that the mortgagee's security is actually impaired; that the security after the injury is insufficient, and that the mortgagor is insolvent. Consequently, where it appeared in an action against a purchaser from the mortgagor for removing buildings from the mortgaged premises after they had been advertised for sale under a power, that the property was worth more than the mortgage debt, the action was not sustained.⁶

It has been held that a mortgagee has not such a direct title to the property as to enable him to maintain an action against a third person for an injury done the premises through his negligence, though he might do so if the injury were done with the

¹ *Levy v. New York*, 3 Robt. (N. Y.) 194.

² *Morgan v. Gilbert* (C. C. Mich. 1880), 2 Fed. Rep. 835. In this case the mortgagor was insolvent.

³ *Gardner v. Heartt*, 3 Den. (N. Y.) 232.

⁴ *Yates v. Joyce*, 11 Johns. (N. Y.) 136; *Lane v. Hitchcock*, 14 Ib. 213; *Allison v. McCune*, 15 Ohio, 726; *Carpenter v. Canal Co.* 35 Ohio St. 307.

⁵ *Van Felt v. McGraw*, 4 N. Y. 110.

⁶ *Lane v. Hitchcock*, 14 Johns. (N. Y.) 213.

express intent to damage the premises, the mortgagor being unable to pay the debt; thus an action cannot be maintained by him for negligently removing earth from a hill adjoining the mortgaged premises in such a manner as to allow the earth to slide down upon the premises and injure them, although it might be maintained if the act had been done fraudulently, with the intent to injure the mortgagee.¹

697. Emblements. — The mortgagor, until foreclosure or possession taken by the mortgagee, is entitled to emblements, and when they are severed, has an absolute right to them without any liability to account for them. They are covered by the mortgage until severance, but belong to the mortgagor afterwards.² A mortgagee not in possession cannot therefore maintain trespass *quare clausum* against one who cuts and removes the grass.³

Trees and shrubs planted in a nursery, for the purpose of cultivation and growth, until they are fit to be sold and transplanted, pass by a mortgage of the land, so that the mortgagor cannot remove them as personal chattels.⁴ But if the mortgagee had notice that the trees belonged to a firm of which the mortgagor was a member, though planted on his land with his assent, the firm has the right to remove them.⁵

A mortgagor compelled to surrender the estate is not, like a tenant at will, entitled to emblements. The mortgagee may evict him without notice, and retain the emblements.⁶ A lessee holding under the mortgagor by a lease granted subsequently to the mortgage, and without the mortgagee's concurrence, has no greater rights than the mortgagor; and when evicted by the paramount title of the mortgagee, as he may be without notice, he cannot retain the emblements.⁷ A purchaser at a foreclosure sale is entitled to the crops growing at the time of the sale, and may maintain trespass against the mortgagor or his lessee for taking and carrying them away;⁸ or replevin for the property.⁹

¹ *Gardner v. Heartt*, 3 Den. (N. Y.) 232.

⁴ *Maples v. Millon*, 31 Conn. 598.

² *Woodward v. Pickett*, 8 Gray (Mass.), 617; *Colman v. Duke of St. Albans*, 3 Ves. Jun. 25; *Toby v. Reed*, 9 Conn. 216; *Gillett v. Balcom*, 6 Barb. (N. Y.) 370; *Cooper v. Cole*, 38 Vt. 185; *Brown v. Thurston*, 56 Me. 126; *Rankin v. Kinsey*, 7 Bradw. (Ill.) 215.

³ 263.

⁵ *King v. Wilcomb*, 7 Barb. (N. Y.)

⁶ *Downard v. Groff*, 40 Iowa, 597; *Gilman v. Wills*, 66 Me. 273.

⁷ *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Anderson v. Strauss*, 98 Ill. 485.

⁸ *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Downard v. Groff*, 40 Iowa, 597.

⁹ *Hewes v. Bickford*, 49 Me. 71; *Woodward v. Pickett*, *supra*; *Page v. Robinson*, 10 Cush. (Mass.) 99.

⁹ § 1658; *Scriven v. Moote*, 36 Mich. 64; *Aldrich v. Reynolds*, 1 Barb. (N. Y.) Ch. 613.

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If the mortgagee become the purchaser at such sale he may maintain the action.¹ Moreover, the purchaser at the foreclosure sale may by injunction restrain the mortgagor from taking the crops, and may restrain his creditor from proceeding under execution to levy upon them.²

698. The purchaser may waive this right. A mortgagor who was in default sowed a field on the mortgaged premises with rye. He died and his administrator sold the crop. Before it was taken off, the mortgage was foreclosed under a power of sale, and at the sale the auctioneer announced that the rye having been sold was reserved. The purchaser at the mortgage sale claimed the crop; but he was adjudged not entitled to it, though he would have been had it not been expressly excepted.³

¹ *Lane v. King*, 8 Wend. (N. Y.) 584.

² *Crews v. Pendleton*, 1 Leigh (Va.), 297.

³ *Sherman v. Willett*, 42 N. Y. 146. Chief Justice Earle said: "While a mortgagee is not bound to sell the mortgaged premises in parcels unless they are in the mortgage described in parcels, yet I have no doubt he may do so where the premises are so situated that he can sell in parcels; and in such a case, when he has sold land enough to satisfy his mortgage, he need sell no more; and in such a case, if any one can complain of a sale by parcels, and seek to avoid the foreclosure, it certainly cannot be a purchaser, but must be some one at the time interested in the equity of redemption. When it is admitted that a mortgagee can release a

portion of the premises and sell the remainder, although they are described as a whole in the mortgage, I do not see why he may not sell the same portion before releasing any. In this case, the mortgage was a lien upon the whole premises, including the rye, and at the time of sale the mortgagee announced that he would not sell the rye, but would sell the balance. The purchaser knew this, and bid with this understanding. The rye was not sold. The purchaser did not buy it. How can he claim it? If the sale was void because not regularly made, and because the entire premises were not sold, then certainly the defendant has no standing upon which he can base any claim to the rye."

CHAPTER XVI.

A MORTGAGEE'S RIGHTS AND LIABILITIES.

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| I. The nature of his estate or interest, 699-706. | III. His liability to third persons, 722- 734. |
| II. His rights against the mortgagor, 707-721. | |

1. *The Nature of his Estate or Interest.*

699. The mortgagee is not in a general sense the owner of the mortgaged estate, although, as already noticed, under the common law doctrine he holds the legal title to the estate.¹ Before foreclosure he can be regarded as the owner only in a very limited sense. A mortgage of certain lands, "with all the other lands I own in the town of Norfolk," was held not to pass the title to land which the grantor held by a deed absolute in its terms, which was in fact a mortgage, though the defeasance by a separate instrument had not been recorded.² For some purposes, however, he may be regarded as an owner after he has taken possession;³ but before he has taken possession it seems that there is no sense in which he could be so regarded, unless it be with reference to a proceeding to enforce his rights as mortgagee.⁴

700. A mortgage before foreclosure is completed is personal assets, and upon the death of the mortgagee vests in his executor or administrator. The mortgage can be transferred released, or foreclosed, only by the executor or administrator.⁵ A quitclaim deed by the heir at law passes no title whatever in the premises,⁶ although such a deed by the executor or administrator would transfer the mortgage interest by way of assignment;⁷ and

¹ §§ 11-59.

² *Mills v. Shepard*, 30 Conn. 98. In this case there was no proof that the mortgagee had examined the records, and had taken the mortgage relying upon the security of the land in question. What the effect of such evidence would have been is left in doubt.

³ *Lowell v. Shaw*, 15 Me. 242.

⁴ *Great Falls Co. v. Worster*, 15 N. H. 412; *Norwich v. Hubbard*, 22 Conn. 587.

⁵ So by statute in Ohio. R. S. 1880, § 6070; *Baldwin v. Hatchett*, 56 Ala. 461.

⁶ *Conner v. Whitmore*, 52 Me. 185.

⁷ *Collamer v. Langdon*, 29 Vt. 32.

even if the heir at law be at the same time administrator his deed will not operate as an assignment of the mortgage, if he does not convey in the capacity of administrator.¹ The mortgage title vests in the personal representative, who may without any order of court assign or discharge it, or take possession of the property, or proceed to foreclose it by suit.² When foreclosure is had by entry and possession, or by strict foreclosure, the title to the property upon the completion of the foreclosure may ultimately vest in the heir at law; but it vests in him as a distributee of the personal estate, and is first subject to the payment of the debts of the deceased. The fact that there are no outstanding debts does not show that the title of the administrator is terminated; but a decree of distribution is necessary for this, and to determine in whom the property shall vest after the trust in him is satisfied.³ The heirs of a mortgagee have no right as such to enter for condition broken, or to take any action to enforce payment of the mortgage. The debt belongs to the executor or administrator, and the mortgage, which is security for the debt, equally belongs to him.⁴ If the heir cuts and carries away wood and timber from the mortgaged premises, he is liable in trespass to the administrator of the mortgagee, who is in possession by entry or judgment for foreclosure.⁵ A gift by will of a mortgage, or of the testator's interest as mortgagee of a parcel of land, is a bequest of personal property only, and passes no title in the land.⁶

701. The interest of a mortgagee cannot be levied upon or attached for his debts before foreclosure. Some of the earlier cases only decide that the interest of the mortgagee before entry is not attachable; but as all the inconveniences that would attend an attachment before entry continue until foreclosure is complete, the law seems to have become settled that no attachment of the mortgagee's interest can be made till foreclosure.⁷

¹ *Douglass v. Durin*, 51 Me. 121.

² *Collamer v. Langdon*, 29 Vt. 32; *Webster v. Calden*, 56 Me. 204; R. S. of Wis. 1878, § 3829.

³ *Taft v. Stevens*, 3 Gray (Mass.), 504.

⁴ *Smith v. Dyer*, 16 Mass. 18; and it is so provided by statute in this state. Gen. Stat. c. 96, §§ 9, 10.

⁵ *Stevens v. Taft*, 11 Cush. (Mass.) 147.

⁶ *Martin v. Smith*, 124 Mass. 111.

⁷ *Massachusetts*: *Marsh v. Austin*, 1 Allen, 235; *Portland Bank v. Hall*, 13

Mass. 207; *Blanchard v. Colburn*, 16

Mass. 345; *Eaton v. Whiting*, 3 Pick.

484; *New York*: *Jackson v. Willard*, 4

Johns. 41; *Runyan v. Mersereau*, 11 Ib.

534; *Jackson v. Dubois*, 4 Ib. 216; *Hitch-*

cock v. Harrington, 6 Ib. 290; *Collins*

v. Torry, 7 Ib. 278; *Johnson v. Hart*, 3

Johns. Cas. 322, 329. *Other States*: *Hunt-*

ington v. Smith, 4 Conn. 235; *Fish v.*

Fish, 1 Conn. 559; *Cooch v. Gerry*, 3

Harr. (Del.) 280; *Brown v. Bates*, 55 Me.

520; *Nicholson v. Walker*, 4 Bradw. (Ill.)

404; *Scott v. Mewhirter*, 49 Iowa, 487.

While the right of redemption remains, the mortgagor might be much embarrassed by the levy of executions. Until this happens, the mortgaged premises continue to be real estate in the hands of the mortgagor, and liable to be sold on execution against him.

Neither is the interest of the beneficiary in a deed of trust executed to secure a debt subject to a judgment lien or to sale upon execution.¹ Even when the mortgage is made by an absolute deed with a separate agreement executed at the same time to reconvey, the mortgagee's interest is not subject to a judgment lien or execution until the mortgagor's interest has been divested by foreclosure or otherwise.²

702. The mortgagee is entitled to immediate possession, in the absence of any agreement to the contrary. He may enter upon the estate under his deed, even before condition broken, and may maintain an action against the mortgagor as a trespasser, or in a writ of entry recover against him as a disseisor, if he refuse to yield possession. The mortgagee has the remedies of an owner for the purpose of enforcing his lien against the mortgagor or any one claiming under him, but he has them for this purpose only.³ Though restrained from entering upon the mortgaged premises and taking possession before breach of the condition, he may enter and take possession after condition broken, if he can do so peaceably and unresisted.⁴

It has already been noticed that in several states the mortgagee's right before foreclosure to maintain ejectment against the mortgagor, or to recover possession in any way, has been taken away by statute. But this right of possession being implied by

For an argument that the mortgagee's estate is subject to attachment, see *Notes of Mortgages*, by Judge Trowbridge, 8 *Mass. Supplement*, pp. 554, 565.

¹ *Beckett v. Dean*, 57 *Mass.* 232.

² *Scott v. Mewhirter*, 49 *Iowa*, 487; 8 *S. C.* 8 *Cent. L. J.* 39.

³ § 668; *Massachusetts*: *Erskine v. Townsend*, 2 *Mass.* 493; *Goodwin v. Richardson*, 11 *Mass.* 469, 473; *Newall v. Wright*, 3 *Mass.* 138, 155; *Green v. Kemp*, 13 *Mass.* 515, 518; *Bradley v. Fuller*, 23 *Pick.* 1, 9; *Smith v. Johns*, 3 *Gray*, 517; *Fay v. Brewer*, 3 *Pick.* 203; *Flagg v. Flagg*, 11 *Ib.* 475; *Blanchard v. Brooks*, 12 *Ib.* 47, 57; *Fay v. Cheney*, 14

Ib. 399; *Maine*: *Blaney v. Bearce*, 2 *Me.* 132; *Gilman v. Wills*, 66 *Me.* 273; *Allen v. Parker*, 27 *Me.* 531; *Howard v. Houghton*, 64 *Me.* 445; *Treat v. Pierce*, 53 *Me.* 77. *Other States*: *Den v. Stockton*, 12 *N. J. L.* (7 *Halst.*) 322; *Ely v. McGuire*, 2 *Ohio*, 223; *Clark v. Reyburn*, 1 *Kans.* 281; *Woodward v. Parsons*, 59 *Ala.* 625; *Brown v. Stewart*, 1 *Md. Ch.* 87; *Walcop v. McKinney*, 10 *Mo.* 229; *Jackson v. Dubois*, 4 *Johns. (N. Y.)* 216; *Jackson v. Hull*, 10 *Ib.* 481; *Furbush v. Goodwin*, 29 *N. H.* 321; *Shute v. Grimes*, 7 *Blackf. (Ind.)* 1.

⁴ *Fuller v. Eddy*, 49 *Vt.* 11.

law in all mortgages executed prior to the passage of such a statute, is therefore inoperative as to mortgages of prior execution.¹

But even under such statutes it is generally held that a mortgagee, who has gone into peaceable possession of the premises after a default, cannot be ejected by the mortgagor while the mortgage remains unsatisfied.² Any one who has entered into possession under the direction of the mortgagee becomes his tenant, and has the same rights as the mortgagee to retain possession as against the mortgagor. The assignee of a mortgage has all the rights of the mortgagee as to possession, and may defend his possession by showing his mortgage without a foreclosure.³

703. A mortgagee cannot be disseised by the mortgagor.⁴ His possession is not adverse; it is presumed to be in subordination to the title of the mortgagee. He can do no act prejudicial to the mortgagee's title. He cannot bind the mortgagee by any contract or lease respecting the premises. All his acts are subject to the mortgagee's rights; and his possession is not adverse, except the mortgagee elect so to regard it for the sake of his remedy to obtain possession. The mortgagee may treat any person found in possession of the mortgaged premises without a title good against him as a disseisor.⁵

But a mortgagee as well as a mortgagor may be disseised by a stranger; provided there be an actual ouster and exclusive occupation, and not a qualified and occasional use of the land. While such disseisin continues the mortgagee's deed will not pass his interest in the land. The disseisin of the mortgagor is also a disseisin of the mortgagee. This is so even before the mortgagee has made actual entry, and though he has no notice whatever of the disseisin. An exclusive and adverse occupation of the estate by the stranger under a claim of title operates to disseise both

¹ *Blackwood v. Van Vleet*, 11 Mich. 252. Applicable only to suits commenced afterwards. *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165; *Grimes v. Doe*, Ib. 371; *Morgan v. Woodward*, 1 Smith (Ind.) 321.

² *Hennesy v. Farrell*, 20 Wis. 42.

³ *Sahler v. Signer*, 44 Barb. (N. Y.) 606; *Minkler v. Minkler*, 10 Johns. (N. Y.) 480; *Merrit v. Bowen*, 7 Cow. (N. Y.) 13; *Phye v. Riley*, 15 Wend. (N. Y.) 248.

⁴ *Hunt v. Hunt*, 14 Pick. (Mass.) 374; *Shepard v. Pratt*, 15 Ib. 32; *Colton v. Smith*, 11 Ib. 311; *Herbert v. Hanrick*, 16 Ala. 581; *Beach v. Royce*, 1 Root (Conn.), 244; *Judd v. Woodruff*, 2 Ib. 298; *Noyes v. Sturdivant*, 18 Me. 104; *Sweetser v. Lowell*, 33 Me. 446; *Conner v. Whitmore*, 52 Me. 185; *Kruse v. Scripps*, 11 Ill. 98.

⁵ *Wheeler v. Bates*, 21 N. H. 460; *Poignard v. Smith*, 8 Pick. (Mass.) 272.

the mortgagor and mortgagee,¹ and while this continues the mortgagee cannot make a valid assignment of his mortgage.² If, however, the equity of redemption be sold by the sheriff on execution while the mortgagor is disseised, the sale is not void, but the purchaser by the sheriff's deed acquires a seisin in law, which gives him a right of entry, and after actual entry he may maintain a writ of entry.

Exclusive possession by the mortgagor, with a claim of exclusive ownership, does not in itself amount to a disseisin of the mortgagee so as to invalidate a power of sale in the mortgage.

Disseisin, like seisin, once proved is presumed to continue until the contrary is shown; and possession under a disseisor is presumed to continue under his heirs after his death.³

704. A mortgage to two or more persons, to secure debts due to them severally, creates a tenancy in common, and not a joint tenancy.⁴ The interest of each is not necessarily a moiety, but is in proportion to his respective claim.⁵ Each may enforce his claim under the mortgage in a form adapted to the case.⁶ Upon the death of one the survivor cannot maintain an action on the mortgage to enforce the payment of the debt secured by it to the deceased mortgagee.⁷ To a bill in equity affecting interests under such a mortgage, it is not sufficient to make the surviving mortgagee alone a party; the representatives of the deceased mortgagee must be joined.⁸ But if a mortgage be made to partners to secure a joint debt, inasmuch as the debt itself would in case of the decease of one partner vest in the survivor for the purpose of collection, it is held that the estate is a joint tenancy, so that the mortgage security may, by the principle of survivorship, accompany the debt.⁹ After foreclosure, however, the new absolute estate then acquired is considered as a tenancy in com-

¹ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Sheridan v. Welch*, 8 Allen (Mass.), 166.

² *Poignard v. Smith*, *supra*.

³ *Currier v. Gale*, 9 Allen (Mass.), 522.

⁴ *Brown v. Bates*, 55 Me. 520.

⁵ *Donnels v. Edwards*, 2 Pick. (Mass.) 617; and see *Beresford v. Ward*, 1 Disney (Ohio), 169.

⁶ *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

⁷ *Burnett v. Pratt*, *supra*; *Kingsley v. Abbott*, 19 Me. 430.

⁸ *Smith v. Trenton Delaware Falls Co.* 4 N. J. Eq. (3 Green) 505.

⁹ *Appleton v. Boyd*, 7 Mass. 131. In *Randall v. Phillips*, 3 Mason, 378, Mr. Justice Story held that such a mortgage is a tenancy in common. But at the same time he maintained, that on the death of one partner his heirs would take his interest charged with an implied trust for the survivor as security for the debt.

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mon, such as would ordinarily be created by a conveyance to two or more persons.¹

705. When mortgagees may have partition.— Before foreclosure, mortgagees holding under one mortgage, or by simultaneous mortgages, as joint tenants or tenants in common, have no such interest as can be the subject of partition.² Until foreclosure the estate is for most purposes in the mortgagor, and is only a lien or charge, subject to which it may be conveyed, attached, and dealt with in other respects, as the estate of the mortgagor, who may wholly defeat the estate of the mortgagee by redemption. An entry to foreclose does not change this defeasible and redeemable interest of the mortgagee. He has no absolute and certain estate till foreclosure is complete.

A mortgagee of an undivided half of a lot of land upon a completed foreclosure may have partition of the land, against the owner of the other half.³ But until foreclosure is complete the mortgagee does not become a tenant in common with the owner of the other undivided part; he is merely a mortgagee having a lien or charge, from which the mortgagor may redeem the estate, and subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor. He cannot maintain a petition for partition, neither can such a petition be maintained against him by the owner of the other part, or by a judgment creditor of such owner.⁴

706. To bind the mortgagee of the interest of one tenant in common by a partition of the mortgaged premises between the mortgagors, he must be made a party to the suit, or must voluntarily ratify the partition made.⁵ The effect of a partition, in which the mortgagee has joined, as to his interest, and that of his mortgagor, is to substitute for an undivided interest in the whole land, the whole of the portion set off to the mortgagor in severalty. No part of his mortgagor's estate is thereby discharged from the mortgage.⁶

¹ Goodwin v. Richardson, 11 Mass. 469.

² Ewer v. Hobbs, 5 Met. (Mass.) 1.

³ Phelps v. Townsley, 10 Allen (Mass.), 554.

⁴ Norcross v. Norcross, 105 Mass. 265.

⁵ Colton v. Smith, 11 Pick. (Mass.) 311; Loomis v. Riley, 24 Ill. 307.

⁶ Torrey v. Cook, 116 Mass. 163; Bradley v. Fuller, 23 Pick. (Mass.) 1, per Wilde, J. "Tenants in common have sep-

arate freeholds or estates; they have no unity of interest, but unity of possession only. This unity of possession is destroyed by partition, but the estate remains the same." See, also, Jackson v. Pierce, 10 Johns. (N. Y.) 414; Crosby v. Allyn, 5 Me. 453; Williams College v. Mallett, 12 Me. 398; Loomis v. Riley, 24 Ill. 307; Thruston v. Minke, 32 Md. 571; Hull v. Lyon, 27 Mo. 570.

If a tenant in common executes a mortgage of his undivided interest in the land to one of his co-tenants, and all the tenants be made parties to the proceeding for partition, though no mention be made of the mortgage, this may be foreclosed and enforced after partition against the lot set apart to the mortgagor.¹

In case the tenancy in common extends to several separate parcels, and one tenant has mortgaged his undivided interest in one parcel, the proper course is to treat the parcel covered by the mortgage as a separate estate, and to make a separate partition of such parcel. It is true that in Massachusetts it is held that a mortgage made by a tenant in common of an undivided interest in a specified parcel of land is invalid as against his co-tenants; and that partition may be made of the whole estate held in common without regard to the mortgage; that other land may be allotted to the mortgagor in place of the mortgaged parcel; and that if money be awarded to the mortgagor in place of such parcel, the mortgagee cannot demand that the sum so awarded shall be paid to him upon the mortgage.² This doctrine is founded upon several dicta and decisions that a tenant in common, as against his co-tenants, cannot convey his interest in a specified parcel of the lands held in common; that he can only convey an interest in the entire estate held in common; and the reason given is that the co-tenant is entitled, on partition, to have his portion assigned in one entire parcel, according to his aliquot part.³ This doctrine, to the extent it is carried in *Marks v. Sewall*, where the mortgage was upon a distinct parcel wholly unconnected with the other parcel held in common, rests upon no sufficient grounds, and is contrary to the weight of authority.⁴

¹ *Watson v. Priest*, 9 Mo. App. 263.

² *Marks v. Sewall*, 120 Mass. 174.

³ *Adam v. Briggs Iron Co.* 7 Cush. (Mass.) 361, 369, and cases cited.

⁴ *Green v. Arnold*, 11 R. I. 364. *Durfee, C. J.*, says: "Two persons may be tenants in common of several distinct estates, purchased at different times, and widely separated from each other, though all in the same state. Is it reasonable to hold that neither of them can sell his interest in any one of the estates unless he sells it in all of them? Or that no person can safely purchase, or attach, or take a mortgage of the interest of either of them in any one of the estates, unless he at the same time purchases, or attaches, or takes

a mortgage of his interest in all of them? If the rule is so, the purchaser or mortgagee of an undivided interest will have to search the records of every registry in the state before he can be sure he is not getting an invalid title. This is putting too great a burden on purchasers and mortgagees. It is enough if the purchaser or mortgagee of an undivided interest purchases or takes a mortgage of such interest in the whole of any separate estate, or if the owner of such interest so sells or mortgages and conveys the same, notwithstanding he and his co-tenant may be tenants in common of other estates."

See, also, *Butler v. Roys*, 25 Mich. 53, where the cases are elaborately reviewed;

The doctrine can be sustained only to the extent of preventing the dismemberment of a single lot or parcel of land.

But a decree of partition cannot extend the mortgage to any property not described and included in such mortgage; for instance, if the mortgage cover the undivided interest of one tenant in common in several parcels of land, and the tenancy in common extends to other parcels or estates, the aggregate parcels covered by the mortgage must, for the purpose of partition, be considered as one separate estate. The whole estate held in common cannot be divided, and the mortgage be made to cover all the parcels allotted to the mortgagor, though not all described in the mortgage.¹

If the mortgage cover less than the entire interest of the mortgagor in the whole estate held in common, when the estate is divided, the mortgage will cover a proportional interest in the whole of the part allotted to the mortgagor.²

If the common property be incapable of partition, and a sale is rendered necessary in order to effect a division, the existence of mortgages of undivided interests presents no substantial objection to a decree of sale free of incumbrances, and the discharging of these out of the proceeds. If there be any doubt or uncertainty as to the extent of the liens, the court should direct the determination of their amounts before the sale.³

A tenant in common who has mortgaged his undivided share in the land may, so long as he remains in possession, maintain a petition for partition against the owner of the other shares in the land;⁴ but if his mortgagee be the owner of the other shares he cannot, without his consent, have partition; for it is an adverse proceeding affecting either the title, or the possession, or both, and the mortgagee has both the legal title, and after default at least the right of possession.⁵ But in such case the mortgagee can have partition if he desires it.⁶

If one tenant in common take an assignment of a mortgage upon the land, his co-tenant cannot maintain a petition for partition against him, but his only remedy is by redemption of the whole mortgage, or contribution of his share of the incumbrance.⁷

Freeman on Cotenancy and Partition, §§ 201-204, where the decisions of several states are given.

¹ Green v. Arnold, 11 R. I. 364.

² Randell v. Mallett, 14 Me. 51.

³ Thruston v. Minke, 32 Md. 571.

⁴ Upham v. Bradley, 17 Me. 423.

⁵ Fuller v. Bradley, 23 Pick. (Mass.) 1, 8.

⁶ Green v. Arnold, 11 R. I. 364.

⁷ Blodgett v. Hildreth, 8 Allen (Mass.), 186.

2. *His Rights against the Mortgagor.*

707. A mortgagee is entitled to the whole mortgaged premises as security for his debt, and cannot be compelled to take a portion of the premises either as security or payment, or to submit to the uncertain result of a sale by order of court. A creditor of the mortgagor, by levying an execution on the equity of redemption and having an undivided part set off to himself, acquires no right to have the premises sold and the proceeds divided between himself and the mortgagee, though the premises are worth more than enough to pay the debts to both.¹

Although the land subject to a mortgage be subsequently laid out in lots and streets, and the streets opened and dedicated to the public by the owner of the land, the mortgagee's lien upon the land covered by the streets is not affected. But if sales of lots bounding upon the streets be made, and the mortgagee releases those lots from the operation of his mortgage by deeds referring to a map of the land as laid out, and reciting that they are the lots previously conveyed by the owner, the release discharges not only the lien upon the lots, but upon half of the street in front of them.²

708. An award of damages. — When the mortgaged property has been turned into money, or a claim for money in any way, as, for instance, by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim.³ Thus if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them, as an equivalent for the land taken for the street.⁴

Damages awarded to a mortgagor for land taken for a right of way, or other public improvement, become a substitute for the premises taken, and the mortgage is a specific lien upon the fund;⁵ as also do damages awarded by the state for an injury done to the property by the abandonment of a canal, equitably

¹ *Spencer v. Waterman*, 36 Conn. 342.

⁴ *Astor v. Hoyt*, 5 Wend. (N. Y.)

² *Hague v. West Hoboken*, 23 N. J. Eq. 354.

603.

³ § 681; *Brown v. Stewart*, 1 Md. Ch.

⁵ *Astor v. Miller*, 2 Paige (N. Y.), 68; *Re John and Cherry Sts.* 19 Wend. N. Y.

87; *Platt v. Bright*, 31 N. J. Eq. 81.

659; *Gimbel v. Stolte*, 59 Ind. 446.

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belong to the holder of the mortgage.¹ "The sum awarded arises from or grows out of the land, by reason of the injury which has diminished its value. In equity it is the land itself."²

The mortgage lien attaches to the surplus arising from the sale of the premises under a prior incumbrance.³

709. A mortgagee is an essential party to any proceeding affecting his rights to the mortgaged premises; as, for instance, to a bill to set aside a previous sale of the property under proceedings in insolvency;⁴ to a bill to compel performance of a contract by the owner to convey the estate;⁵ to an application to set apart a portion of the mortgaged premises as a homestead;⁶ or to a suit to set aside a purchase of real estate by an administrator who had given a mortgage while in possession, and claims title under his purchase.⁷ But a mortgagee who has not entered is not a necessary party to a proceeding which relates altogether to an injury done to the possession; as, for instance, to a complaint for flowage under the mill act; for the damages in such case belong exclusively to the mortgagor in possession, being paid annually, in the same manner that any other annual products or damages for injury to them, or the possession of the land, belong to the mortgagor alone.⁸

710. A mortgagee is to the extent of his claim a purchaser of the land, and is entitled to the same protection from all secret equities and trusts of which he had no notice as any other *bond fide* purchaser.⁹ He is not affected by his mortgagor's fraud in acquiring his title.¹⁰

If the mortgage was executed by the mortgagor for the purpose of defrauding his creditors, although the mortgagee had no notice of such fraudulent intent, he cannot be considered a *bond fide* purchaser beyond the amount paid by him at the time.¹¹ But a mortgagee who has knowledge of a previous conveyance of the mortgaged property, although it be fraudulent as to the mort-

¹ Bank of Auburn v. Roberts, 44 N. Y. 192; S. C. 45 Barb. 407.

² Per Leonard, C., in Bank of Auburn v. Roberts, *supra*.

³ Bartlett v. Gale, 4 Paige (N. Y.), 503.

⁴ Coiron v. Millaudon, 19 How. 113.

⁵ Hoxie v. Carr, 1 Sumn. 173.

⁶ Lies v. De Diablar, 12 Cal. 327.

⁷ Woodruff v. Cook, 2 Edw. (N. Y.) 259.

⁸ Paine v. Woods, 108 Mass. 160.

⁹ Pierce v. Faunce, 47 Ma. 507; Martin v. Jackson, 27 Pa. St. 504; Brophy Mining Co. v. Brophy & Dale Gold & Silver Mining Co. 15 Nev. 101; Hayden v. Drury (C. C. Ill. 1880), 3 Fed. Rep. 782, 789.

¹⁰ Stockton v. Craddick, 4 La. Ann. 282, 285.

¹¹ Tripp v. Vincent, 8 Paige (N. Y.), 176; Hall v. Arnold, 15 Barb. (N. Y.) 599.

gagor's creditors, cannot call in question its validity.¹ The assignee of a mortgage is also a purchaser.²

711. That a mortgagee may purchase the mortgagor's equity of redemption, though doubted in some early cases, is as a general proposition true,³ though the transaction will be closely scrutinized, so as to prevent any oppression of the debtor.⁴ The relation between them is not so far analogous to that between a trustee and *cestui que trust* as to preclude the mortgagee's purchasing. The real reason why a person standing in the relation of trustee cannot purchase from his *cestui que trust* is, that he cannot purchase that which he has to sell. He has a duty to perform as a trustee, in selling for the best advantage of the beneficiary; and this is inconsistent with his personal interest to obtain the property on terms advantageous to himself. But there is no trust relation between the mortgagor and the mortgagee. The mortgagee is under no obligation to protect the equity of redemption. In exercising a sale under the power which usually accompanies a mortgage, this trust relation will arise so as to prevent his purchasing unless he is authorized by statute, or by the contract itself, to become a purchaser. There he has a trust to fulfil in selling for the mortgagor. But until this trust arises he may deal with the mortgagor himself in respect to the mortgaged estate; subject only to the qualification

¹ Fox v. Willis, 1 Mich. 321.

² Hayden v. Drury (C. C. Ill. 1880), 3 Fed. Rep. 782.

³ §§ 1038-1046; Knight v. Majoribanks, 2 Mac. & G. 10; Ten Eyck v. Craig, 62 N. Y. 406; S. C. 2 Hun, 452; 5 Thomp. & C. 65; Remsen v. Hay, 2 Edw. (N. Y.) 535; Hicks v. Hicks, 5 Gill & J. (Md.) 75; Hinkley v. Wheelwright, 29 Md. 341; Green v. Butler, 26 Cal. 595; Shelton v. Hampton, 6 Ired. (N. C.) L. 216.

See, however, Whitehead v. Hellen, 76 N. C. 99; Lee v. Pearce, 68 N. C. 76; McLeod v. Bullard, 84 N. C. 515, 531.

In Whitchote v. Lawrence, 3 Ves. Jun. 740, Lord Chancellor Loughborough states the rule with force and accuracy: "The rule is laid down not very correctly, in most of the cases, where you find it. It is stated as a proposition, that a trustee cannot buy of the *cestui que trust*. Certainly that naked proposition is not cor-

rectly true; but an emanation from that which prevails in all cases, in all laws and countries, where trusts are admitted, led to great discussion in M'Enzie's case, to prove that the sale, where the trustee to sell is the purchaser, is *ipso jure* null; that there is no sale, no contracting party. That is not the real sense of the proposition; but it is this, — which is very plain in point of equity, and a principle of clear reasoning: that he who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit."

⁴ Pugh v. Davis, 96 U. S. 332, 337; Oliver v. Cunningham (C. C. Mich. 1881), 7 Fed. Rep. 689.

that the courts look upon their transactions with jealousy, and will set aside a purchase made by the mortgagee, when by the influence of his position, or by constructive fraud, he has gained an unconscionable advantage, and has purchased the equity of redemption for a less price than others would have given.¹

The general rule therefore is that the mortgagee may acquire the equity of redemption either directly from the owner, or at a sale by his assignee in bankruptcy, or by his creditor upon execution.² He may acquire any title adverse to the mortgagor, whatever it may be, and set it up against his claim to redeem.³

If the mortgage was made by a deed absolute upon its face, the mortgagee may show that the equity of redemption was subsequently released to him by a parol agreement of the grantor.⁴

712. The fact that the mortgagee is in possession does not change the rule. By taking possession he does not become a trustee, except in a limited sense. He may, perhaps, be called a trustee in respect to his liability to account for the rents and profits.⁵ "No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it; and after that is fully satisfied its primary character is not fiduciary."⁶ A purchase by the mortgagee in possession will be carefully scrutinized when fraud is charged; and to avoid the purchase in equity it is not necessary to show actual fraud, but constructive fraud is sufficient for that purpose, or even an unconscientious advantage taken of a mortgagor in needy circumstances, which ought not to be retained.⁷ A grossly inadequate price paid for the equity of redemption is ground for such relief.⁸

An agreement made between the mortgagor and mortgagee, after the making of the mortgage, that the mortgagee may purchase the equity of redemption at an appraisal, in the absence of any unfairness in its terms, has been held valid, and enforced.⁹

¹ Webb v. Borke, 2 Sch. & Lef. 661, per Lord Redesdale; Ford v. Olden, L. R. 3 Eq. 461; Oliver v. Cunningham (C. C. Mich. 1881), 7 Fed. Rep. 689; Russell v. Southard, 12 How. 154.

² Blythe v. Richards, 10 S. & R. (Pa.) 261.

³ Walthall v. Rives, 34 Ala. 91; Harrison v. Roberts, 6 Fla. 711.

⁴ Shaw v. Walbridge, 33 Ohio St. 1.

⁵ Per Chief Justice Shaw, in King v. State Mut. F. Ins. Co. 7 Cush, (Mass.) 1, 7; Ten Eyck v. Craig, 62 N. Y. 406, 422;

Clark v. Bush, 3 Cow. (N. Y.) 151; Duval v. P. & M. Bank, 10 Ala. 636.

⁶ Sir Thomas Plumer, in Chomondelley v. Clinton, 2 Jac. & Walk. 183.

⁷ Russell v. Southard, 12 How. 139; Hyndman v. Hyndman, 19 Vt. 9; Perkins v. Drye, 3 Dana (Ky.), 170; Chapman v. Mull, 7 Ired. (N. C.) Eq. 292; McLeod v. Bullard, 84 N. C. 515, 531; Lee v. Pearce, 68 N. C. 76.

⁸ McKinstry v. Conly, 12 Ala. 678.

⁹ Austin v. Bradley, 2 Day (Conn.), 466. In this case the mortgagor, after a

The mortgagee in possession may even purchase the equity of redemption at a sale upon an execution in his own favor issued upon a judgment for a debt other than the mortgage debt; and may hold the title adversely to the mortgagor if he does not redeem, as from a sale upon execution.¹

713. There is a limitation of this rule whenever the mortgagee has either expressly assumed any duty to protect the mortgaged estate in any particular, or such a duty impliedly arises from the relation of the parties. Thus, for instance, it is generally the duty of the mortgagee in possession and receiving an income from the estate to pay the taxes upon it; and therefore he is not allowed to suffer the estate to be sold for taxes, and upon purchasing it in, to set up this title as a bar to the mortgagor's redeeming. He is, on the contrary, regarded as holding this title in trust for the mortgagor's benefit. He may, however, under some circumstances, acquire a tax title, and hold it adversely to the owner of the equity of redemption;² but this is only when he is under no obligation himself to pay the taxes on which the sale was made. Generally a mortgagee not in possession is under no obligation to pay the taxes on the mortgaged property, and there is no reason why he may not acquire title to the property by a fair purchase at a tax sale.³

The mortgagee lawfully acquires for his own benefit and protection any outstanding paramount title.⁴

714. When the payment of the taxes is a duty on his part, he is like a trustee, and cannot affect the rights of the mortgagor by purchasing the property at a sale for such taxes.⁵ Such is his position when he has taken possession of the premises for the purpose of foreclosing his mortgage.⁶ He may pay the taxes,

breach of the condition, agreed in writing to make an absolute conveyance of the premises by warranty deed, on demand, at an appraisal, and that if the appraised value should be more than the sum due on the mortgage the balance should be paid to the mortgagor within one year from the date of the agreement. The appraisal was made, and the balance due the mortgagor was tendered within the time specified to his executors, he having died, and a demand made of a conveyance. The court held that the agreement should be enforced.

¹ *Trimm v. Marsh*, 54 N. Y. 599; *Woodlee v. Burch*, 43 Mo. 231; *Walthal v.*

Rives, 34 Ala. 92; *Harrison v. Roberts*, 6 Fla. 711.

² § 680; *Williams v. Townsend*, 31 N. Y. 411; *Waterson v. Devoe*, 18 Kans. 223; *Morrow v. Dows*, 28 N. J. Eq. 459, note; *Cornell v. Woodruff*, 77 N. Y. 203.

³ *Waterson v. Devoe*, *supra*; *Smith v. Lewis*, 20 Wis. 350; *Chapman v. Mull*, 7 Ired. (N. C.) Eq. 292; *Coombs v. Warren*, 34 Me. 89.

⁴ *Gjerness v. Mathews*, 27 Minn. 320.

⁵ *Ten Eyck v. Craig*, 62 N. Y. 406, 422, per *Andrews, J.*; *Chickering v. Failes*, 26 Ill. 507; *Moore v. Titman*, 44 Ill. 367.

⁶ *Brown v. Simons*, 44 N. H. 475.

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and add the amount to the debt secured by the mortgage, but he cannot acquire an adverse title by a purchase at a sale by the tax collector.¹

If a mortgagee, standing in the relation of a mortgagee in possession, acquire a tax title, and afterwards sells the property under his power of sale and becomes the purchaser, he cannot set up his tax title as against a right of dower which was not released in the mortgage.²

A junior mortgagee cannot before foreclosure of his mortgage acquire a title to the premises paramount to a prior mortgage by taking a tax deed of the same. If the mortgagee acquire such title after foreclosure of his mortgage and purchase of the premises, he cannot set it up against the first mortgagee if the tax was levied after he took possession, because he would then stand in the place of a purchaser, who is bound to pay the taxes.³ Whether he could gain any rights superior to those of the first mortgagee by purchasing a tax title, outstanding at the time of the foreclosure of his mortgage, or issued upon a sale for taxes assessed before that time, and which he was under no obligation to pay, has not, perhaps, been decided; but it would seem that he should not be allowed to set up such title so as to wholly defeat the rights of the prior mortgagee. Upon the ground that taxes are charged as much upon the mortgage interest as upon the equity of redemption, it has been declared that a subsequent mortgagee cannot, by purchasing the tax title, use it adversely to the first mortgage. Such title in his hands enures to the protection rather than the destruction of the title of the prior mortgage.⁴

Whether the mortgagee's lien is affected by a tax sale depends upon the statute in force when the mortgage was made. There is no doubt the legislature has power to make taxes a lien paramount to mortgages and other liens taken after the enactment of a statute to that effect.⁵ But, generally, the mortgagee has the right to redeem, from a tax sale, within a limited time after receiving notice of the sale.⁶

¹ *Brown v. Simons*, *supra*; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398; *Johnson v. Payne*, 11 Neb. 269. 30 N. J. Eq. 667; S. C. 2 N. J. L. J. 142; *Morrow v. Dows*, 28 N. J. Eq. 459; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Parker v. Baxter*, 2 Gray (Mass.), 185.

² *Walsh v. Wilson*, 130 Mass. 124.

³ *Smith v. Lewis*, 20 Wis. 350.

⁴ *Horton v. Ingersoll*, 13 Mich. 409.

⁵ *Trustees of Public Schools v. Trenton*,

⁶ As in *New York*: 1 R. S. 1875, p. 968, § 121; *Becker v. Howard*, 66 N. Y. 5. *Massachusetts*: G. S. c. 12, § 36.

If a mortgagee of a lease obtain a renewal of it, the mortgagor is entitled to the benefit of it, he paying the mortgagee for his charges. "The mortgagee but grafts upon his stock, and it shall be for the mortgagor's benefit."¹ The rule is the same in case the lease expired before the renewal of it. So if a mortgagee, by an agreement with the mortgagor, purchase an outstanding prior incumbrance, the mortgagor is entitled to redeem from such outstanding title on payment of the sum paid by the mortgagee for it.

715. A mortgagee cannot be divested of possession until payment. Even where a mortgagor cannot be divested of his possession without a foreclosure and sale, if the mortgagee, or any one standing in his place, has with the assent of the mortgagor obtained possession, neither the latter, nor any one claiming under him, can, by an action of ejectment or otherwise, recover possession until the debt is paid.²

A mortgagee who has acquired possession before his mortgage became due, by virtue of some other title, is to be deemed at the maturity of his mortgage as holding as a mortgagee in possession upon a forfeiture; and therefore, although he has lost the title under which he originally entered, he may defend his possession under his mortgage.³

¹ Lord Chancellor Nottingham in *Rushworth's case*, Freem. 12; *Rakestraw v. Brewer*, 2 P. Wms. 511; *Nesbitt v. Tredennick*, Ball & B. 29; *Moore v. Titman*, 44 Ill. 367.

² *Hubbell v. Moulson*, 53 N. Y. 225; *Pell v. Ulmar*, 18 N. Y. 139; *Watson v. Spence*, 20 Wend. (N. Y.) 260; *Fox v. Lipe*, 24 Ib. 164; *Phyfe v. Riley*, 15 Ib. 248; *Van Duyn v. Thayer*, 14 Ib. 233; *Fogal v. Firro*, 17 Abb. (N. Y.) Pr. 113; *S. C.* 10 Bosw. 100; *Chase v. Peck*, 21 N. Y. 581, 586; *Roberts v. Sutherlin*, 4 Oregon, 219; *Dickason v. Dawson*, 85 Ill. 53; *Nicholson v. Walker*, 4 Bradw. (Ill.) 404; *Martin v. Fridley*, 23 Minn. 13; *Brinkman v. Jones*, 44 Wis. 498.

In *Kortright v. Cady*, 21 N. Y. 343, 365, Chief Justice Comstock, in the Court of Appeals of New York, speaking of the use of this action for the recovery of possession of the mortgaged premises, said: "When the legislature by express enactment denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining ves-

tige of the ancient rule of the common law, which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession; like the possession of any other pledge; but when its object is accomplished it is neither just nor lawful for an instant longer." To like effect see *Brinkman v. Jones*, 44 Wis. 498.

³ *Winalow v. McCall*, 32 Barb. (N. Y.) 241; *Bolton v. Brewster*, Ib. 389. *Contra Cable v. Ellis*, 86 Ill. 525.

The mortgagee's right to enter in any lawful mode and hold possession of the mortgaged premises may be presumed from the mortgage itself, unless there be some agreement modifying the presumption. Although he cannot recover possession by ejectment, being in possession he may hold possession. Even when one is a trespasser in the first instance, and while holding in this way takes an assignment of a mortgage, it would seem after forfeiture, at least, that the mortgagor's consent to his holding possession would be inferred from the mortgage itself.¹ At any rate one who has entered in this way may, after forfeiture, defend his possession as assignee of the mortgagee;² but the mortgage before default would not, it would seem, enable him to defend his wrongful possession of the premises.³

But possession obtained by a mortgagee, through collusion with the mortgagor's tenant, has been held unlawful.⁴

716. If the mortgagee lawfully obtains possession after forfeiture, the mortgagor cannot recover possession without satisfying the mortgage. He cannot maintain ejectment for the premises; his remedy is by a bill to redeem.⁵ An assignee of the mortgage has the same rights in this respect although he hold only an equitable assignment of it.⁶

By the purchase of an overdue mortgage one already in lawful possession of the premises, as, for instance, when he has entered, with the owner's consent, under a contract to purchase them, may by virtue of such title hold them until the debt is paid.⁷ But if he has not acquired the mortgage title at the time of the bringing of suit against him to recover possession of the mortgaged premises, his subsequent purchase of the mortgage will not avail him as a defence.⁸

The beneficiary under a trust deed after condition broken entered upon the premises, and without any sale under the trust deed conveyed the estate. The maker of the deed of trust

¹ *Madison Av. Church v. Oliver St. Church*, 41 N. Y. Superior Ct. 369, per *Sedgwick, J.*; S. C. 73 N. Y. 82.

² *Ib.*

³ *Madison Av. Church v. Oliver St. Church*, 73 N. Y. 82; S. C. 19 Abb. (N. Y.) Fr. 105.

⁴ *Russell v. Ely*, 2 Black, 575; *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

⁵ *Den v. Wright*, 7 N. J. L. (2 Halst.) 175; *Hennessey v. Farrell*, 20 Wis. 42; *Gil-*

lett v. Eaton, 6 Wis. 30; *Tallman v. Ely*, 6 Wis. 244; *Stark v. Brown*, 12 Wis. 572; *Pace v. Chadderton*, 4 Minn. 499; *Harper v. Ely*, 70 Ill. 581; *Wells v. Rice*, 34 Ark. 346.

⁶ *Kilgour v. Gockley*, 83 Ill. 109.

⁷ *Madison Av. Church v. Oliver St. Church*, 2 Robert. (N. Y.), 642; S. C. 3 Ib. 570; 19 Abb. Pr. 105; 1 Abb. Fr. N. S. 214; 73 N. Y. 82.

⁸ *Hall v. Bell*, 6 Met. (Mass.) 431.

brought an action of ejectment against the purchaser, and it was held that although the conveyance did not pass to him the legal title, it operated as an assignment of the equity of the beneficiary; and that being in possession, he could defend successfully against the grantor, unless he paid the debt secured.¹ He is not a mere stranger setting up a title in another.²

717. In a few states, however, by virtue of peculiar provisions of statute, the mortgagor may recover possession from the mortgagee at any time before his rights have in some manner been foreclosed.³ If he goes into possession without permission of the mortgagee, he may be removed through a suit of ejectment.⁴ Having a right of possession by statute, it is held that he may enforce the right. His right to possession must exclude the mortgagee's right to hold it. "It would be absurd," said Mr. Justice Campbell, "to hold there could be a right of possession which could not lawfully be enforced."⁵ When the mortgagee has entered by permission, it would seem that his possession could not be disturbed by the mortgagor without redemption; but in such case his authority would be regarded as resting upon the license, and not upon the mortgage.⁶

718. Writ of entry. — If the possession of a mortgagee after entry is interfered with by the mortgagor or those claiming under him, the mortgagee may maintain his title and his right to possession by a writ of entry, declaring on his own seisin, and may have an absolute judgment for possession as at common law, with damages for the rents and profits of which he was wrongfully deprived.⁷ Such judgment does not interfere with the mortgagor's right to redeem, and upon redemption to claim the rents and profits so recovered. Moreover, when the mortgagee has not been disturbed in his possession, but he has either before or after condition broken the right of possession, he may have judgment at common law against the mortgagor in a writ of entry, unless the defendant claims the conditional judgment where foreclosure may be had by this process.⁸

¹ Johnson v. Houston, 47 Mo. 227.

² Woods v. Hilderbrand, 46 Mo. 284.

³ Humphrey v. Hurd, 29 Mich. 44; Caruthers v. Humphrey, 12 Mich. 270; Morrow v. Morgan, 48 Tex. 304; Mills v. Heaton, 52 Iowa, 215, 217.

⁴ Newton v. McKay, 30 Mich. 380.

⁵ Newton v. McKay, *supra*.

⁶ Newton v. McKay, *supra*, per Campbell, J.

⁷ Stewart v. Davis, 63 Me. 539; Miner v. Stevens, 1 Cush. (Mass.) 468, per Shaw, C. J. "The action is therefore against wrong-doers, and not against mortgagors."

⁸ Howard v. Houghton, 64 Me. 445; Treat v. Pierce, 53 Me. 71, 77.

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719. Ejectment. — After the maturity of the mortgage, a mortgagee, without foreclosure or sale, may maintain ejectment against the mortgagor, without giving him previous notice.¹ A second mortgagee may maintain the action, although there be an outstanding first mortgage still unsatisfied. The first mortgagee is regarded as holding the legal title only for the purpose of enforcing payment of the debt.²

If the mortgagee bring ejectment for possession of the property, the defendant may prove by parol that the mortgage debt has been paid. After the mortgage debt has been satisfied, the mortgagee cannot maintain an action at law to recover possession, although the mortgage has not been formally discharged.

In such suit, however, the mortgagor cannot introduce evidence to show that the mortgage is one of indemnity, and that the mortgagee has suffered no damage.³ Even the admissions of the mortgagee that the mortgage is not a lien are not admissible, except in favor of a subsequent purchaser or incumbrancer, who has been misled by them.⁴ The mortgage alone, duly executed, acknowledged, and recorded, is admissible in evidence of the mortgagee's title to the land mortgaged, without first producing the notes which it was given to secure.⁵

A *cestui que trust* in a trust deed is not a mortgagee, and has no such title as will enable him to maintain ejectment.⁶

In Michigan ejectment of the mortgagor by the mortgagee is forbidden by statute. The mortgagor cannot be disturbed in his possession until foreclosure is absolute. The parties cannot even by an agreement in the mortgage abridge the mortgagor's right of possession.⁷

720. Forcible entry and detainer. — This process is not applicable to the case of a mortgagee who has attempted to take possession under a mortgage for a breach of condition, and whose attempt has been repelled by force. The remedy is by a writ of entry. The defendant has the right to have the court inquire and determine how much is due upon the mortgage, and also has a right to have a conditional judgment entered, which, under

¹ *Allen v. Ranson*, 44 Mo. 263; *Carroll v. Ballance*, 26 Ill. 9; *Johnson v. Watson*, 87 Ill. 535.

² *Savage v. Dooley*, 28 Conn. 411; *Rosevelt v. Stackhouse*, 1 Cow. (N. Y.) 122; *Gray v. Jenks*, 3 Mason, 520.

³ *Jackson v. Jackson*, 5 Cow. (N. Y.) 173.

⁴ *Jackson v. Jackson*, *supra*.

⁵ *Smith v. Johns*, 3 Gray (Mass.), 517.

⁶ *Barnum v. Cook*, 14 Mo. App. 590.

⁷ *Batty v. Snook*, 5 Mich. 231; *Haseltine v. Granger*, 44 Mich. 503.

the practice in Maine and Massachusetts, delays for two months the issue of the execution, and gives a chance for redemption.¹

Neither a mortgagee who has not taken possession of the mortgaged premises nor a purchaser at a sale under the power, can maintain this process for the purpose of obtaining possession of the property. The object of the statute is to give a speedy remedy to those who, being in possession of land, are unlawfully dispossessed by force, and not to permit questions of title to be tried by a summary process before an inferior tribunal.²

For the same reason a lessee, who has never been in possession of the premises, and who acquires title through a purchaser at a mortgagee's sale, neither the purchaser nor the mortgagee having ever been in possession, cannot maintain this process.³

Where a party, in giving a trust deed, acknowledges himself the tenant of the trustee, and covenants that if he fails to surrender immediate possession to the purchaser, in case of a sale under the power therein, an action of forcible detainer may be employed to dispossess him, the action will lie against him upon the happening of the contingency.⁴

721. A mortgagee who has entered for condition broken may maintain trespass for mense profits against one who is in possession of the premises under the mortgagor, and refuses to yield possession, although the entry may not have been sufficient for the purpose of foreclosure.⁵ A mortgagee in possession may maintain a complaint in his own name for damages caused by flowing under a mill act.⁶ For an injury to the freehold rather than to the possession, a mortgagee not in actual possession may, after condition broken, maintain trespass against the mortgagor; as, for instance, for cutting and carrying to market timber trees standing on the mortgaged land. After condition broken the mortgagee's right to possession accrues, and carries with it the right to sue in trespass for such an injury. The possession of the mortgagor is not adverse, and an injury to the freehold is beyond a matter of possession of the mortgagor; and whoever be the

¹ Walker v. Thayer, 113 Mass. 36; Gerish v. Mason, 4 Gray (Mass.), 432; Hastings v. Pratt, 8 Cush. (Mass.) 121; Larned v. Clarke, *Id.* 29; Clement v. Bennett, 70 Me. 207; Dunning v. Finson, 46 Me. 546, 553; Reed v. Elwell, 46 Me. 270; Necklace v. West, 33 Ark. 682.

² Boyle v. Boyle, 121 Mass. 85.

³ Woodside v. Ridgeway, 126 Mass. 292.

⁴ Chapin v. Billings, 91 Ill. 539.

⁵ Northampton Paper Mills v. Ames, 8 Met. (Mass.) 1; and see Miner v. Stevens, 1 Cush. (Mass.) 482.

⁶ Ballard v. Ballard Vale Co. 5 Gray (Mass.), 468.

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wrong-doer, he is amenable to the mortgagee for a violation of his rights.¹

3. *His Liability to Third Persons.*

722. As between the original parties the release of a part of the premises does not affect the mortgagee's lien upon the residue. This is bound for the whole debt.² But as against others who have liens upon portions of the mortgaged premises, a mortgagee with notice of such liens has no right to release any portion of the mortgaged premises to the injury of the owners of such liens.³ It is only after receiving notice of such liens that he becomes responsible for his acts in releasing portions of the land.⁴ But if the mortgagee receives a fair value for the property released, and applies this to the payment of a prior incumbrance which the mortgagor had assumed the payment of, the latter is not discharged from his liability, especially if, knowing of the intended release, he advises the making of it.⁵

This rule, however, does not apply when the unreleased portions subsequently mortgaged are ample security for both mortgages.⁶

The mortgagee, by releasing one of two parcels of land which are charged with the burden of the incumbrance, may, to the extent of the value of the lot so released, diminish his security; because in such case the purchaser of the other parcel cannot compel the purchaser of the parcel so released to contribute, and the mortgagee who has interfered and discharged a portion of his lien must in effect make contribution, by abating such a proportion of the sum due on the mortgage as the value of the parcel released bore at the time of the execution of the mortgage to the value of both parcels.⁷

A mortgagee who knows that portions of the mortgaged premises have been subsequently conveyed or incumbered is not allowed in equity to release those parts of the land on which he has the only lien, and to enforce his entire claim upon those por-

¹ § 695; Page v. Robinson, 10 Cush. Eq. 219; Vanorden v. Johnson, 14 N. J. (Mass.) 99; Stowell v. Pike, 2 Me. 387. Eq. 376; Kelley v. Whitney, 45 Wis.

² §§ 981, 982; Coutant v. Servoss, 3 Barb. (N. Y.) 128. ³ Wolf v. Smith, 36 Iowa, 454. ⁴ Vanorden v. Johnson, 14 N. J. Eq.

⁵ Paxton v. Harrier, 11 Pa. St. 312; 376. ⁶ Williams v. Wilson, 124 Mass. 257.

M'Lean v. Lafayette Bank, 3 McLean, 587; Blair v. Ward, 10 N. J. Eq. (2 Stockt.) 119; Cogswell v. Stout 32 N. J. ⁷ Kelley v. Whitney, 45 Wis. 110. Parkman v. Welch. 19 Pick. (Mass.)

Eq. 240; Harrison v. Guerin, 27 N. J. 231.

tions in which others have become interested. Justice may require that the lien of the mortgage be extinguished as to those parts in which subsequent parties have become interested.¹ But if they can be protected without that, he may still enforce his mortgage against the remaining portions of the land, so far as he can be allowed to do so consistently with their protection. If the mortgagee after actual notice of an absolute sale of a portion of the premises by the mortgagor releases other portions, the mortgage is discharged wholly or *pro tanto*, according to the circumstances, upon that part owned by such subsequent purchaser. The purchaser or mortgagee of the part of the property remaining may insist on a credit upon the mortgage debt of a sum equal to the value of the property released.²

Where a mortgagee releases several parcels of land covered by the mortgage, upon payment of amounts proportionate to the value which they bear to the mortgage debt, and all the remaining lots, except one in possession of a purchaser from the mortgagor, are subsequently sold under foreclosure of the mortgage for amounts not proportionate to the actual value which they bear to the mortgage debt, but without any fault on the part of the mortgagee, the remaining lot is subject to the payment of the balance of the mortgage debt.³

A provision in a mortgage that the mortgagee shall release parts of the mortgaged premises, on request of the mortgagor or his heirs or assigns upon the payment of a fixed price per acre, is, so far as the price is concerned, for the protection of the mortgagee; and if the mortgagee, at the request of a grantee of the mortgagor, release parts of the premises at a less price, but for a price not less than the value of the land, the liability of the mortgagor to pay a deficiency is not affected, in the absence of any notice to the mortgagee of the assumption of the mortgage debt by the grantee, and notice not to release for a less sum than that stipulated for.⁴

The rights of parties claiming, under separate conveyances from the mortgagor, different parts of the mortgaged premises, are

¹ *Parkman v. Welch*, 19 Pick. (Mass.) 231; *Deuster v. McCamus*, 14 Wis. 307; *Kelley v. Whitney*, 45 Wis. 110; *Stevens v. Cooper*, 1 Johns. (N. Y.) Ch. 425; *Guion v. Knapp*, 6 Paige (N. Y.), 35; *Benton v. Nicoll*, 24 Minn. 221; *Warner v. De Witt Co. Nat. Bank*, 4 Bradw. (Ill.) 305; *Hall v. Edwards*, 43 Mich. 473.

² *Hawhe v. Snyder*, 86 Ill. 197.

³ *Barney v. Myers*, 28 Iowa, 472.

⁴ *Woodruff v. Stickle*, 28 N. J. Eq. 549; *Hawhe v. Snyder*, 86 Ill. 197.

several and not joint, as to any question arising upon releases of other parts of the mortgaged property by the mortgagee.¹

723. The mortgagee who has actual or constructive notice of the equity of such purchaser must regard it; and therefore if he releases a part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser.² But the mere record of a subsequent conveyance by the mortgagor of a part of the premises is not constructive notice of it to him.³ Neither is it the duty of the mortgagee to make inquiry whether a junior incumbrancer has intervened.⁴ It would not be reasonable to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage. A notice by letter giving the names of the purchasers is sufficient, if the deed be on record so that full information can be obtained from that.⁵ It is enough if notice of facts out of which the subsequent equity arises is brought home to him in such a way as to make it his duty to inquire further before acting.⁶

Neither does mere possession, standing alone, without the mortgagee's knowing who has possession, and without notice of any facts which should provoke inquiry, affect him with notice.⁷ But where a purchaser of a portion of the mortgaged premises situated near the residence of the mortgagee recorded his deed and went into actual possession of the property, improved it, and lived upon it, the mortgagee's knowledge of these facts was held to be enough to put him on inquiry before releasing other parts of the premises from the mortgage.⁸

A subsequent purchaser takes his title with full knowledge of the mortgage, and if he wishes to protect himself he should no-

¹ *Hawhe v. Snyder*, 86 Ill. 197.

² *Gilbert v. Haire*, 43 Mich. 283.

³ §§ 562, 1624; *George v. Wood*, 9 Allen (Mass.), 80, and cases cited; *Deuster v. McCamus*, 14 Wis. 307; *Straight v. Harris*, 14 Wis. 509; *Patty v. Pease*, 8 Paige (N. Y.), 277; *Guion v. Knapp*, 6 Ib. 35; *Brown v. Simons*, 44 N. H. 475; *Wheelwright v. Depeyster*, 4 Edw. (N. Y.) 232; *Taylor v. Maris*, 5 Rawle (Pa.), 51; *Vanorden v. Johnson*, 14 N. J. Eq. 376; *Cogswell v. Stout*, 32 N. J. Eq. 240; *Kipp v. Merselis*, 30 N. J. Eq. 99; *Dewey v. Ingersoll*, 42 Mich. 17; *Meacham v. Steele*, 93 Ill. 135.

⁴ *McIlvain v. Mut. Assurance Co.* 93 Pa. St. 30.

Neither is an attaching creditor bound to inquire whether there is a junior incumbrance of a part of the premises, before releasing a part from his attachment. *Johnson v. Bell*, 58 N. H. 395.

⁵ *Hall v. Edwards*, 43 Mich. 473.

⁶ *Cogswell v. Stout*, 32 N. J. Eq. 240; *McIlvain v. Mut. Assurance Co.* 93 Pa. St. 30.

⁷ *Cogswell v. Stout*, 32 N. J. Eq. 240.

⁸ *Dewey v. Ingersoll*, 42 Mich. 17.

tify the mortgagee of his purchase. The record is constructive notice only to subsequent purchasers, or those claiming under the same grantor.¹

724. In like manner one holding a mortgage to secure a debt for which another is liable as surety has no right to release the mortgage and still hold the surety liable; for the surety is entitled to the benefit of the security given by the principal debtor, and the creditor is not allowed, as against him, to do any act impairing or releasing such security.²

If a mortgagee discharges a surety by his laches or conduct, he also discharges any mortgage the surety has given to secure the debt.³ And so where a principal debtor and his surety join in a mortgage of lands of which the legal title is in the surety and the equitable title is in the principal debtor, and the surety is discharged by the negligence of the mortgagee, the mortgage, which is but an incident of the debt, is discharged so far as it affects the rights and property of the surety. But the mortgage remains a valid security as against the principal debtor and his equitable interest in the lands.⁴

725. The holder of a junior mortgage upon one of two lots embraced in a prior mortgage may compel the prior mortgagee to resort in the first place to the other lot, upon which there is no other incumbrance;⁵ but if the other lot be incumbered by a mortgage to another person, the prior mortgagee will be required to satisfy his claim out of the proceeds of both lots, in proportion to the amount which each may produce.⁶

But although generally a second mortgagee has an equitable right to have other security in the hands of the first mortgagee applied to the payment of the mortgage before resorting to the land, when this course is likely to occasion much delay to the prior mortgagee in obtaining satisfaction, the court will decree the satisfaction of his claim from the mortgaged property, but will at the same time provide for the subrogation of the second mortgagee to the other security.⁷

726. A mortgage to a surety to secure him is, in effect, a

¹ Cheever v. Fair, 5 Cal. 337; McIlvain v. Mut. Assurance Co. 93 Pa. St. 30.

² Hayes v. Ward, 4 Johns. (N. Y.) Ch. 123.

³ Stephens v. Monongahela Bank, 88 Pa. St. 157.

⁴ White v. Life Association of America, 63 Ala. 419.

⁵ Henshaw v. Wells, 9 Humph. (Tenn.) 568.

⁶ Green v. Ramage, 18 Ohio, 428.

⁷ King v. McVickar, 3 Sandf. (N. Y.) Ch. 192.

security to the principal creditor, and he is entitled to the benefit of it.¹ If it be a mortgage of indemnity the surety cannot enforce it until he has been injured, or has paid the debt for which he was surety;² and in like manner the security does not in the first instance attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the security arises afterward, and comes into existence only when the surety's right to call upon the security becomes fixed.³

A surety holding such a mortgage cannot, while the debt remains unpaid, impair the rights of the principal creditor, by discharging the mortgage or entering satisfaction of record; and a purchaser of the mortgaged property from the debtor after such discharge or satisfaction, is chargeable with notice of the creditor's rights under the mortgage.⁴

But although a mortgage to indemnify a surety attaches to the debt for the benefit of the creditor, this is a secondary use of the security, which is to be used primarily for the benefit of the mortgagee; therefore, if it be taken to indemnify one who is surety on several notes, and he is discharged upon some but continues liable upon others, he has the right to use the security for the payment in the first place of those notes upon which he is liable, while the other notes have the incidental benefit of the remainder of the security.⁵ For instance, suppose the original security was taken to indemnify a surety against several notes, part of which were attested by a witness and part were not so attested; and that after the lapse of six years the surety was discharged upon the unattested notes by the bar of the statute of limitations, but not discharged upon the others; he is entitled to pay out of the security the notes upon which he is still liable; not only because he has a superior equity, but because he stands upon the ground of another rule of law, that of two or more having equal claims in equity, he who has a legal title is preferred.⁶

A mortgagee having a specific demand secured by a mortgage upon his debtor's property, and other claims not secured, upon a

¹ *Moore v. Moberly*, 7 B. Mon. (Ky.) 299; *Rice v. Dewey*, 13 Gray (Mass.), 47; *Dick v. Truly*, 1 Sm. & M. (Miss.) Ch. 557; *National Shoe & Leather Bank v. Small* (D. C. Me. 1881), 7 Fed. Rep. 837.

² § 1187; *Hall v. Cushman*, 16 N. H. 462.

³ *Jones v. Quinpiack Bank*, 29 Conn.

25. See, however, *M'Lean v. Lafayette Bank*, 3 McLean, 587.

⁴ *McMullen v. Neal*, 60 Ala. 552.

⁵ *Eastman v. Foster*, 8 Met. (Mass.)

19. See *Miller v. Wack*, 1 N. J. Eq. (Sax.) 204.

⁶ *Eastman v. Foster*, 8 Met. (Mass.)

19, per Shaw, C. J.

conveyance by the debtor of his equity of redemption and other property in trust to pay all his debts, is entitled to secure the whole amount of his mortgage out of the land, and to come in *pro rata* with other creditors as to his other claims.¹

727. If a mortgagee release the mortgagor from personal liability, he thereby diminishes the security of a subsequent purchaser of part of the premises, and therefore the lien of the mortgage, so far as the rights of such subsequent purchaser are concerned, is discharged. The fact that another person at the same time assumed the debt does not prevent the discharge, if the subsequent purchaser did not assent to the substitution.² This rule is applicable as well to the case of a subsequent mortgagee, though in some cases the effect of the release of the mortgagor's personal liability might be to give the second mortgage priority over the first, instead of absolutely discharging the premises from the lien.³

In like manner if a mortgagee release a grantee of the mortgaged premises from his liability to pay the mortgage debt in accordance with his agreement of assumption contained in the deed to him, the mortgagor is thereby released from his liability for a deficiency arising upon a foreclosure of the mortgage.⁴

728. A mortgagee having other security for the payment of the debt secured by the mortgage, and having notice of a subsequent mortgage upon the same premises, is bound in equity to apply in the first instance to the payment of the debt the security in which the subsequent mortgagee does not share; and if the prior mortgagee under such circumstances releases the other security, his mortgage is, to the extent of the value of that security, satisfied so far as such subsequent mortgagee is concerned.⁵ In like manner, if he also holds personal property as security for the same debt, he also may be compelled by the heir or widow of the mortgagor to resort in the first instance to the personal property, so as to relieve the land to that extent from the burden.⁶

Upon the same principle, a building association holding a mortgage upon the real estate of one of its stockholders, whose stock is also pledged as collateral security for the loan, cannot have re-

¹ § 1631; *Bell v. Hammond*, 2 Leigh (Va.), 416.

² *Coyle v. Davis*, 20 Wis. 564.

³ *Sexton v. Pickett*, 24 Wis. 346.

⁴ *Paine v. Jones*, 76 N. Y. 274.

⁵ § 1623; *Washington Build. & Loan*

Ass'n v. Beaghen, 27 N. J. Eq. 98; *Herbert v. Mechanics' Build. & Loan Ass'n*, 17 N. J. Eq. 497; *Bergen Savings' Bank v. Barrows*, 30 N. J. Eq. 89.

⁶ *Harrow v. Johnson*, 3 Metc. (Ky.) 578; *Davis v. Rider*, 5 Mich. 423.

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course to the mortgaged premises as against one holding a second mortgage upon them, until it has sold the stock and applied the proceeds of it to the payment of the mortgage debt.¹ This equity cannot be defeated by a levy upon the stock under a judgment obtained by a creditor against the mortgagor. As against such creditor, the holder of a subsequent mortgage is entitled to have the stock sold and applied to the payment of the first mortgage before recourse is had to the land.² The court may order a senior mortgagee holding other security for his claim to exhaust that before resorting to the security covered by the junior mortgage.³

But an equity in the mortgagor may intervene to prevent the application of this principle. Thus where one mortgage covers two tracts of land, one of which is a homestead, and another mortgage covers only the tract not a homestead, the holder of the former mortgage will not be compelled to resort to the homestead tract first, in order to leave the other tract, so far as may be, for the other mortgagees.⁴

729. So in like manner upon the insolvency or bankruptcy of the mortgagor, the mortgagee may do as he pleases about proving his claim against the estate of the debtor. He may, if he choose, pay no regard to his personal claim and rely upon the land alone.⁵ Or, if his security be inadequate, he may have it valued, and prove his demand for the balance. But if he prove his whole claim against the estate of his debtor, without reference to his mortgage, he thereby waives his mortgage security; and in this respect the law is the same when upon the death of the mortgagor his estate is represented insolvent, and the mortgagee has his whole claim allowed, and receives a dividend upon the whole; he thereby releases his security.⁶ It is by force of statute, however, that a mortgagee is prevented from proving his whole claim against the estate of his debtor, either during his lifetime or after his decease, and also resorting to the mortgage for the balance. Upon the death of the mortgagor, the holder of the mortgage is not bound to seek payment of his debt out of the

¹ Red Bank Mut. Build. & Loan Ass'n v. Patterson, 27 N. J. Eq. 223.

² Phillipsburg Mut. Loan & Build. Ass'n v. Hawk, 27 N. J. Eq. 355; and see cases cited.

³ Swift v. Conboy, 12 Iowa, 444.

⁴ McArthur v. Martin, 23 Minn. 74.

⁵ §§ 1231-1236; Bennett v. Calhoun Asso. 9 Rich. (S. C.) Eq. 163; Walker v. Baxter, 26 Vt. 710; Slack v. Emery, 30 N. J. Eq. 458.

⁶ Hooker v. Olmstead, 6 Pick. (Mass.) 481.

personal estate, by presenting his claim to the personal representative, and the only effect of his not doing so within the time allowed is to deprive him of all benefit of the personal estate. He may resort to the land after his claim against the personal estate of the deceased is barred ;¹ or under the statutes as they exist in some states, he may prove the debt against the estate of a deceased mortgagor, receive a dividend, and enforce his mortgage lien for any portion of the debt remaining unpaid.²

730. As against a subsequent mortgagee the parties to a prior mortgage cannot change its terms. A junior mortgagee has the right upon the maturity of the senior mortgage to redeem it, and this right cannot be affected by an agreement between the parties to such prior mortgage, fixing upon a higher rate of interest than that specified in the mortgage.³ A subsequent mortgagee is presumed to have acquired his interest with reference to the existing liens as they appear of record, and his rights cannot be prejudiced by private arrangements between the parties.⁴

731. Where a homestead is included with other realty in a mortgage, there is no implied obligation on the mortgagee that he shall first exhaust his remedy on the land other than the homestead ; but he may release the other land and still maintain his lien on the homestead.⁵ "It is said that the homestead belongs to and is designed by the law for the family, and that their rights are paramount to the rights of creditors. We cannot assent to the claim as thus broadly stated. It means that when a creditor takes a mortgage on the homestead and other property, though nothing is expressed, there is an implied agreement to consider the homestead as a sort of secondary security, a security for security ; that the other property mortgaged is the primary security ; and that if that proves insufficient, and *only* when that proves insufficient, can the lien on the homestead be enforced. That parties may make such a contract, is unquestionable ; that the legislature may establish such a rule, is probable."⁶ Thus,

¹ Grafton Bank v. Doe, 19 Vt. 463 ; Inge v. Boardman, 2 Ala. 331 ; Jefferson College v. Dickson, 1 Freem. (Miss.) Ch. 474 ; Patton v. Page, 4 Hen. & M. (Va.) 449.

² Schulenburg v. Martin, 1 McCrary, 348.

³ Gardner v. Emerson, 40 Ill. 296.

⁴ Whittacre v. Fuller, 5 Minn. 508.

⁵ And see §§ 731, 1286, 1632 ; Chapman v. Lester, 12 Kans. 592 ; Searle v. Chapman, 121 Mass. 19 ; White v. Polleys, 20 Wis. 503 ; Jones v. Dow, 18 Wis. 241.

⁶ Per Brewer, J., in Chapman v. Lester, *supra*.

in Iowa, the rule is so established by reason of the provisions of the Code of that state.¹ And such is the rule in California.² And it was there held that when one member of a partnership mortgaged his homestead to secure a partnership debt, after an assignment by the firm for the benefit of creditors, the mortgagee must first look to the partnership assets, and then to the homestead only for the deficiency.³

But in the absence of legislation, of express contract, or of intervening rights, the courts are not warranted in interpolating such a stipulation.⁴ If other equities intervene, as, for instance, where a judgment has been obtained against the mortgagor after the mortgage, the equity of the mortgagor's family being superior to the claim of the judgment creditor, it is proper to order that the real estate other than the homestead be first sold.⁵

The Constitution of Texas prohibits a forced sale of a homestead, and provides that no mortgage of it, although executed by both husband and wife, shall be valid.⁶ A former constitution of the state containing the former provision, but not the latter, was construed as not only prohibiting a sale of a homestead under a mortgage, but also as preventing the mortgagee's recovering possession of it by ejectment.⁷

When a first mortgage is made without a release of homestead, and a subsequent mortgage is made with such release, the junior mortgage has priority to the extent of the homestead right.⁸ There are cases, however, that support the principle that a debtor who waives his homestead privilege as to one creditor, waives it as to all; for instance, if he waives it as to a second judgment creditor or mortgagee, he waives it as to the first;⁹ and the second gains no preference over the first; but they take rank in

¹ *Twogood v. Stephens*, 19 Iowa, 405; *Barker v. Rollins*, 30 Iowa, 412.

² *McLaughlin v. Hart*, 46 Cal. 638.

³ *Dickson v. Chorn*, 6 Iowa, 19.

⁴ *Chapman v. Lester*, 12 Kans. 592.

⁵ *LaRue v. Gilbert*, 18 Kans. 220.

⁶ Art. 16, § 50 of Const. of 1875. The Const. of 1868, art. 12, § 15, did not contain the latter provision.

⁷ *Lanahan v. Sears*, 102 U. S. 318.

In *Sampson v. Williamson*, 6 Tex. 102, this prohibition, while applying to a sale under process of court, was not regarded as applying to a sale under a power. A

sale by a mortgagee or trustee in the mode contemplated by the parties to the deed was not regarded as a forced sale. This view was affirmed in several cases, the latest of which is *Jordan v. Peak*, 38 Tex. 429. In *Lanahan v. Sears*, *supra*, Mr. Justice Field declared that a forced dispossession in ejectment is as much within the prohibition as a forced sale under judicial process.

⁸ *Eldridge v. Pierce*, 90 Ill. 474; S. C. 11 Chicago L. N. 201; *Shaver v. Williams*, 87 Ill. 469.

⁹ *Pittman's Appeal*, 48 Pa. St. 315.

the distribution of the proceeds according to the dates of the liens.¹

732. It is clear enough that rights of subsequent mortgagees cannot be defeated by any arrangement between a prior mortgagee and the mortgagor, or by any adjudication of their respective rights. But when the first mortgage is in the form of an absolute deed, it is sometimes difficult to determine what the rights of subsequent incumbrancers are, or how these rights may be affected by subsequent dealings of the grantor and the grantee. This is illustrated by a case in Iowa,² where the owner of land sold it and received payment for it, but afterwards loaned a sum of money to the purchaser, and having made no deed of the land, it was agreed that he should retain the title of the land, and should convey it upon payment of the sum loaned. Subsequently, and while the purchaser had no title other than this contract, he mortgaged a part of the land to secure a debt. Several years after this the purchaser brought an action upon the contract, asking for a conveyance of the land or judgment for the amount of the purchase money paid upon it, in case the reconveyance could not be enforced. A judgment was rendered in behalf of the purchaser, which was satisfied by the payment of a sum of money. Soon after this a suit was brought to foreclose the mortgage, and a decree of foreclosure was sustained. It was said that the transaction between the vendor and purchaser of the land amounted to a mortgage; that the purchaser could have conveyed his interest or estate in the land absolutely, and that he could mortgage it as well. It is plain that the first mortgagee, by payment of the judgment against him, acquired only that interest in the land which the mortgagor could have conveyed to him by deed. If the subsequent mortgage was valid when it was made, it could not be defeated by such conveyance or judgment; and accordingly it was held that the first mortgagee acquired the mortgagor's interest subject to the subsequent mortgage, and that a decree should be entered for a sale of the land to satisfy it.³

733. A second mortgagee of a portion of the premises takes his title subject to the whole amount of the prior mortgage. In view of the rule that a conveyance of a portion of the mortgaged premises by warranty deed leaves the remainder of the

¹ Shelly's Appeal, 36 Pa. St. 373; *White v. Polleys*, 20 Wis. 503; *In re Cogbill*, 2 Hughes, 313.

² *Davis v. Rogers*, 28 Iowa, 413.

³ *Davis v. Rogers*, *supra*.

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premises primarily liable in equity for the whole amount of the mortgage, it should be borne in mind that one taking a mortgage of such residue takes it, in like manner, subject to the whole amount of the prior mortgage.¹ The mortgagor can, of course, give no greater rights than he himself possesses. He has no equity to compel the purchaser to contribute to the payment of the prior mortgage, and therefore he cannot confer upon his second mortgagee of the remainder any such equity:

There may be circumstances, however, under which a subsequent mortgagee may be entitled to his mortgagor's equity to compel another person to discharge a prior mortgage; as, for instance, where, upon the dissolution of a partnership, one of the partners has agreed to pay a certain partnership debt secured by a mortgage upon the land of the other partner, and the latter has afterwards mortgaged it again.²

734. A mortgagee may be estopped to assert his mortgage. A mortgagee who stands by at an auction sale of the property by the mortgagor, and hears the announcement made that the purchaser will get an unincumbered title, and says nothing, is estopped from setting up his mortgage against one who buys at such sale and pays his money under the impression that he is getting an unincumbered title, even though the mortgage was duly recorded at the time of the sale. To allow the mortgage to be set up would be a fraud on the purchaser, although the mortgagee had no fraudulent intent in not correcting the announcement.³

But the mortgagee is not estopped to enforce his mortgage by reason of his being present and omitting to state his title at a sale of the mortgaged premises by the mortgagor's assignee in bankruptcy, when the auctioneer offers only the right, title, and interest of the bankrupt, and no inquiry is made of the mortgagee in regard to his mortgage, which is duly recorded.⁴

In like manner, if by a statement that his mortgage is discharged he lead another to buy the property, or to take a mortgage upon it, he cannot afterwards, as against such purchaser or mortgagee, set up his mortgage as against such purchaser or mortgagee.⁵

A mortgagee may be estopped from asserting his mortgage for

¹ *Kallogg v. Rand*, 11 Paige (N. Y.), 59.

² *Markham v. O'Connor*, 52 Ga. 183.

⁴ *Mason v. Philbrook*, 69 Me. 57.

³ *Kinney v. M'Cullough*, 1 Sandf. (N. Y.) Ch. 370.

⁵ *Lasselle v. Barnett*, 1 Blackf. (Ind.) 150.

a larger sum than he states to a purchaser of the equity of redemption to be due him, especially if he uses any active efforts to induce a sale of the property. But the proof of the facts out of which the estoppel is claimed to arise should be clear and satisfactory. If the statement of the mortgagee as to the amount due is a mere matter of opinion, and the purchaser relies upon the assurances of the mortgagor from whom he purchases, when he might by the use of reasonable diligence ascertain the true amount of the incumbrance, the mortgagee is not estopped from claiming the amount due him as against the purchaser. If a written agreement as to the amount of the incumbrance be taken from the mortgagee, before completing the purchase, the latter will not be allowed to prove verbal statements and assurances made by the mortgagee as to the nature and extent of the incumbrance, unless a mistake be shown in the agreement as written ; and on the other hand, the mortgagee will be estopped from claiming any more than the written agreement calls for.¹

¹ Preble v. Conger, 66 Ill. 370.

CHAPTER XVII.

A PURCHASER'S RIGHTS AND LIABILITIES.

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| I. Purchase subject to a mortgage, 735-739. | III. Personal liability of purchaser, 748-785. |
| II. Assumption of mortgage by purchaser, 740-747. | |

1. *Purchase Subject to a Mortgage.*

735. The clause in a deed referring to the existence of a prior mortgage is of much importance in other ways than in determining whether the purchaser engages to pay the mortgage, or merely buys subject to it. In the first place, it may qualify the grantor's liability upon the covenants of the deed against incumbrances by showing the existence of the mortgage, and that as between him and the grantee the latter is to pay it.¹ It may prevent, by a statement as to what an incumbrance upon the property is, any liability on the part of the grantor to the penalties imposed by statute upon one who sells incumbered property without disclosing the incumbrance. It may preclude the grantee from impeaching the validity of the mortgage existing upon the property conveyed.² It may subject the land to the burden of the mortgage without imposing upon the grantee any personal liability to pay it.³ It may have an important bearing upon the liability of the grantor in case an extension of the mortgage is afterwards made without his consent.⁴ It may render the grantee directly liable for the mortgage debt to the mortgagee, or it may make him liable merely to his grantor.⁵ Moreover, under this clause arise questions of notice affecting others who may claim

¹ *Collins v. Rowe*, 1 Abb. (N. Y.) N. C. 97.

² *Ritter v. Phillips*, 53 N. Y. 586.

³ *Collins v. Rowe*, 1 Abb. (N. Y.) N. C. 97.

⁴ *Calvo v. Davies*, 8 Hun (N. Y.), 222; S. C. 73 N. Y. 211.

⁵ *Garnsey v. Rogers*, 47 N. Y. 233;

Binsse v. Paige, 1 Abb. (N. Y.) App. Dec. 138.

under the deed.¹ The mode, therefore, in which this clause is expressed is of extreme importance, both in the drawing of the instrument and in the interpretation of its effect.

One having purchased land by a deed with covenants of seisin and warranty mortgaged it to his grantor for the purchase money by a deed containing the same covenants. Being evicted by a paramount title he brought an action against his grantor on his covenant of seisin. The action was held to be maintainable, the mortgagor's covenants not operating as a rebutter.²

When land is conveyed "subject to" a mortgage, and the amount of it is deducted from the consideration, with the intention that it shall be paid by the grantee,³ it is important that the mortgage be excepted from the covenants of the mortgage, otherwise the grantor may be held to have covenanted against the incumbrance, and to have made himself liable for its payment.⁴ The fact that the incumbrance is mentioned in a deed to which reference is made does not avail to qualify the covenants of a deed.⁵ Oral evidence that the parties intended or agreed that the incumbrance should be excepted from the covenants is not admissible, because its effect would be to vary or control the deed.⁶

The mention of an existing mortgage for a certain amount is only by way of description and identification of the mortgage, which, to the extent of all sums due thereon for principal or interest, is a single incumbrance. A covenant that the premises "are free from all incumbrances except as aforesaid," is not a covenant that there was no interest due upon the mortgage at the time of the conveyance; and therefore the grantee cannot recover from the grantor, in an action upon the covenant, the amount of accrued interest he has been obliged to pay to prevent a foreclosure of the mortgage.⁷

¹ *Campbell v. Vedder*, 1 Abb. (N. Y.) App. Dec. 295.

² § 68; *Sumner v. Barnard*, 12 Met. (Mass.) 459.

³ A clause obligating the grantee to assume an existing mortgage may be as follows: "Said premises are hereby conveyed subject to a certain mortgage, dated, &c., and recorded, &c., and of which the sum of \$— is now due, which mortgage the said grantee, his heirs and assigns, are to assume and pay, the said amount forming a part of the above-

named consideration." *Crocker's Com. Forms*, 38.

⁴ *Estabrook v. Smith*, 6 Gray (Mass.), 572. In this case the covenant against incumbrances excepted the mortgage, but the covenant of warranty did not; and it was held that the mortgagor was bound to pay it.

⁵ *Harlow v. Thomas*, 15 Pick. (Mass.) 66.

⁶ *Spurr v. Andrew*, 6 Allen (Mass.), 420.

⁷ *Shanahan v. Perry*, 130 Mass. 460.

736. One who purchases an equity of redemption by a deed without covenants takes the estate charged with the payment of the mortgage debt. It is presumed, in the absence of a special contract or of any unusual circumstance, that the amount paid was the price of the property purchased, less the amount of the mortgage, and it would be for the purchaser, and not the seller, to discharge the incumbrance.¹ In such case therefore the purchaser cannot pay off the debt, and then keep the mortgage alive by taking an assignment of it to himself, and set it off against an unpaid balance still due from him to his vendor.² If it appear that the incumbrances were not deducted from the consideration paid, and the purchaser has given back a mortgage for the purchase money, although his deed be without covenants, and he knew of the existence of the incumbrances, he may pay them off, and deduct the amount from the mortgage he has given.³

When one purchases land expressly subject to a mortgage, the land conveyed is as effectually charged with the incumbrance of the mortgage debt as if the purchaser had expressly assumed the payment of the debt, or had himself made a mortgage of the land to secure it.⁴ The amount of an existing mortgage having been deducted from the purchase money of the incumbered property, the grantee in effect undertakes to pay the amount of the purchase money represented by the mortgage to the holder of it, and he is as effectually estopped to deny its validity as he would be had he in terms agreed to pay such mortgage.⁵ The difference between the purchaser's assuming the payment of the mortgage, and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability.⁶ In both cases he takes the land charged with the payment of the debt, and is not allowed to set up any defence to its validity, as, for instance, that the mortgage is void wholly or in part on account of usury.⁷

¹ *Shuler v. Hardin*, 25 Ind. 386; *Gayle v. Wilson*, 30 Gratt. (Va.) 166; S. C. 5 Reporter, 667; *Savings Bank v. Grant*, 41 Mich. 101; *Dickason v. Williams*, 129 Mass. 182.

² *Atherton v. Toney*, 43 Ind. 211.

³ *Wolbert v. Lucas*, 10 Pa. St. 73.

⁴ *Sweetzer v. Jones*, 35 Vt. 317; *Cobb v. Dyer*, 69 Me. 494; *Fuller v. Hunt*, 48

Iowa, 163; *Manwaring v. Powell*, 40 Mich. 371; *Berry v. Whitney*, 40 Mich. 65.

⁵ § 744; *Johnson v. Thompson*, 129 Mass. 398; *Tuite v. Stevens*, 98 Mass. 305.

⁶ *Woodbury v. Swan*, 58 N. H. 380; *Strohauer v. Voltz*, 42 Mich. 444; *Winnans v. Wilkie*, 41 Mich. 264.

⁷ *Green v. Turner*, 38 Iowa, 112; *Grei-*

A statement, however, in a deed of a portion of the premises covered by a mortgage, made by a purchaser from the original mortgagor, that the grant is subject to such mortgage, does not alone make this mortgage a specific charge upon the portion or interest granted by such deed.¹

If the equity of redemption be sold on execution, the purchaser cannot either legally or equitably claim that the mortgagor shall pay off the mortgage. The purchase is made subject to the mortgage, and the premises, as between the purchaser and the mortgagor, become primarily liable for the debt.² In a levy of an execution on an equity of redemption, the amount of an existing mortgage having been allowed in the creditor's favor in the appraisal of the interest set off to him, he cannot set up the invalidity of the incumbrance.³

If the premises be conveyed to the mortgagee by a deed which recites that the conveyance is made subject to the mortgage which forms part of the consideration of the conveyance, the mortgage is paid, and the mortgagee cannot maintain a suit against the mortgagor upon the mortgage debt for a deficiency.⁴

737. One who has purchased subject to a mortgage is not entitled to the benefit of collateral security placed in the hands of the mortgagee by the vendor after the execution of the mortgage. By purchasing in this way, the land becomes the primary fund for the payment of the mortgage debt, and the purchaser has nothing to do with any other security taken for the debt not a part of the original transaction.⁵

The principles of equity in regard to the marshalling of securities are not applicable to the case of a mortgagee and a subsequent purchaser of the equity of redemption; but are confined to cases where two or more persons are creditors of the same debtor, and have successive demands upon the same property, the one prior in right having other securities. The purchaser takes what he purchases, — the equity of redemption, — and nothing more. He acquires no equitable interest in other securities held by the

ther *v. Alexander*, 15 Iowa, 470; *Perry v. S. C. Clarke* Ch. 321; *Lovelace v. Webb*, 62 Ala. 271.

Kearns, 13 Iowa, 174; *Pinnell v. Boyd*, 33 N. J. Eq. 190; *Dolman v. Cook*, 14 N. J. Eq. 56, 63; *Conover v. Hobart*, 24 N. J. Eq. 120; *Lee v. Stiger*, 30 N. J. Eq. 610; *Fuller v. Hunt*, 48 Iowa, 163.

¹ *Slater v. Breese*, 36 Mich. 77.

² *Russell v. Allen*, 10 Paige (N. Y.), 249; *Vanderkemp v. Shelton*, 11 Ib. 28;

³ *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn. 9; *Lord v. Sill*, 23 Conn. 319; *Waterman v. Curtis*, 26 Conn. 241; *Russell v. Dudley*, 3 Met. (Mass.) 147.

⁴ *Dickason v. Williams*, 129 Mass. 182.

⁵ *Brewer v. Staples*, 3 Sandf. (N. Y.) Ch. 579.

mortgagee,¹ and he has no right to have the mortgage debt charged upon the mortgagor personally in exoneration of the land.²

738. If the purchaser buy a mere equity of redemption, he is not personally liable for the mortgage debt;³ or liable either legally or equitably to indemnify his grantor against the mortgage.⁴ He may give up the property at any time in satisfaction of the lien.⁵ The mortgage debt remains an incumbrance upon the estate, and a debt of the mortgagor; but not a debt of the person buying. In the absence of a special agreement to assume the mortgage, the purchaser is not personally liable for it.⁶

Where by the terms of contract for the purchase of real estate, the vendee is to take it subject to a certain mortgage, he may properly refuse to accept a deed containing a clause reciting that he assumes the payment of such mortgage.⁷ If having such a contract he accepts, without inspection, a deed, wherein he is made to assume the mortgage, and he does not discover this until judgment for a deficiency has been entered against him in a foreclosure suit, he may have the judgment opened, and may show by the contract that he was not liable for the deficiency,⁸ and may have the mortgage reformed by striking out the assumption clause, unless an estoppel has arisen in favor of a third person.⁹

The proof of the recording of a deed in which there is a covenant that the grantee shall assume and pay an existing mortgage, raises a presumption that the title vested in the grantee, and that he is bound by the covenant, unless there be evidence tending to show the contrary.¹⁰

But in the absence of fraud a grantee who has assumed a mortgage cannot show by parol evidence that he never agreed to assume it, and that he never authorized or knew of the insertion of such an agreement in the deed.¹¹

¹ *Stevens v. Church*, 41 Conn. 369.

² *Cherry v. Monroe*, 2 Barb. (N. Y.) Ch. 618; *Brewer v. Staples*, 3 Sandf. (N. Y.) Ch. 579; *Mathews v. Aikin*, 1 N. Y. 595.

³ § 748; *Fiske v. Tolman*, 124 Mass. 254; *Strong v. Converse*, 8 Allen (Mass.), 557; *Rourke v. Coulton*, 4 Bradw. (Ill.) 259; *Hall v. Mobile & Montgomery Ry. Co.* 58 Ala. 10; *Merriman v. Moore*, 90 Pa. St. 78.

⁴ *Smith v. Truslow*, 84 N. Y. 660.

⁵ *Tichenor v. Dodd*, 3 Green (N. J.) Ch. 454, and cases cited.

⁶ *Johnson v. Monell*, 13 Iowa, 300.

⁷ *Lewis v. Day*, 53 Iowa, 575; *Manhattan L. Ins. Co. v. Crawford*, 9 Abb. N. C. (N. Y.) 365.

⁸ *Northern Dispensary of N. Y. v. Merriam*, 59 How. (N. Y.) Pr. 226; *Deyermund v. Chamberlin*, 22 Hun (N. Y.), 110; *Waring v. Somborn*, 82 N. Y. 604.

⁹ *Real Estate Trust Co. v. Balch*, 45 N. Y. Superior Ct. 528; *Kilmer v. Smith*, 77 N. Y. 226, affirming 43 Superior Ct. 461.

¹⁰ *Lawrence v. Farley*, 9 Abb. N. C. (N. Y.) 371.

¹¹ *Muhlig v. Fiske*, 131 Mass. 110; *Cool-*

ASSUMPTION OF MORTGAGE BY PURCHASER. [§§ 739, 740.]

On the other hand if the contract of sale provides that the purchaser shall assume and pay an existing mortgage, but the deed omits to provide for this, it would seem that the contract might be enforced specifically when it is established that there will be a deficiency, and the amount of this has been definitely ascertained.¹

739. The purchase of a paramount title by the grantee of the mortgagor does not enure to the benefit of the mortgagee, nor does it operate in any way to confirm the mortgage title.²

2. *Assumption of Mortgage by Purchaser.*

740. Generally, one purchasing land subject to an existing mortgage does not merely purchase the equity of redemption, but purchases the whole estate, and assumes the payment of the mortgage as a part of the purchase money of it. The vendor, especially if he be also the mortgagor, usually requires such an undertaking on the part of the purchaser, so that the debt may be a charge upon him, and not merely a charge upon the land. As between these parties the purchaser thus becomes primarily liable, and the mortgagor only a surety for the payment of the debt. The mortgaged property, moreover, becomes, as between them, the primary fund for the payment of the debt. The purchaser having made the mortgage debt his own debt cannot take an assignment of the mortgage, and hold it as an independent title, but it is thereupon merged and discharged.³ If a senior mortgagee becomes the purchaser, and assumes the payment of a junior mortgage, his own mortgage is merged and discharged, so that the junior mortgage takes precedence.⁴

One who has assumed the payment of a mortgage cannot defend against a claim of dower by the widow of the grantor, by setting up an assignment of the mortgage to himself upon payment of the amount due, she having joined to release dower in the mortgage, but not in the deed to him.⁵ In like manner, one who has assumed the payment of two mortgages upon the granted

idge v. Smith, 129 Mass. 554; Blyer v. Monholland, 2 Sandf. (N. Y.) Ch. 478.

¹ Slauson v. Watkins, 44 N. Y. Superior Ct. 73.

² Knox v. Easton, 38 Ala. 345.

³ Mills v. Watson, 1 Sweeny (N. Y.), 374; Lilly v. Palmer, 51 Ill. 331; Russell v. Pistor, 7 N. Y. 171; Jumel v. Jumel, 7

Paige (N. Y.), 591; Blyer v. Monholland, 2 Sandf. (N. Y.) Ch. 478; Gilbert v. Averill, 15 Barb. (N. Y.) 20; Andrews v. Wolcott, 16 Ib. 21; Gayle v. Wilson, 30 Gratt. (Va.) 166; S. C. 5 Reporter, 667.

⁴ Fowler v. Fay, 62 Ill. 375.

⁵ McCabe v. Swap, 14 Allen (Mass.), 188.

premises cannot, by taking an assignment of the first mortgage, defend against the second.¹

When the lands have thus become the primary fund for the payment of the debt, subsequent purchasers are chargeable with notice of this equitable right to resort to the land, equally as if their own deeds in terms disclosed that they were to take the premises subject to the payment of the mortgage.²

741. A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety;³ but the mortgagee may treat both as principal debtors, and may have a personal decree against both.⁴ The mortgagee may release the mortgagor from his personal liability in such case without discharging the land, or the grantee, who assumed the debt.⁵ But he cannot release the grantee, who has thus become the principal debtor, without releasing the mortgagor who has become the surety.⁶ He may, by his dealings with the purchaser and mortgagor, recognize the former as the principal debtor, and the latter as surety towards himself. Any material alteration of the mortgage contract will discharge the mortgagor. Accordingly a clause in a mortgage to the effect that the mortgagee would, upon request, release portions of the mortgaged premises, from time to time, upon receipt of a certain sum per acre, having been abrogated by agreement between the holder of the mortgage and a purchaser of the property who had assumed the payment of the mortgage, it was held that such a change had been made in the mortgage contract as to release the mortgagor from all liability under it.⁷ Doubtless the abrogation of this clause impaired a

¹ *Converse v. Cook*, 8 Vt. 164.

² *Weber v. Zeimet*, 30 Wis. 283; *Freeman v. Auld*, 44 N. Y. 50; S. C. 37 Barb. 587, and cases cited; *Calvo v. Davies*, 8 Hun (N. Y.), 222.

³ § 1713; *Wales v. Sherwood*, 52 How. (N. Y.) Pr. 413; *Calvo v. Davies*, 8 Hun (N. Y.), 222; S. C. 73 N. Y. 211, 215; *Fleishhauer v. Doellner*, 9 Abb. N. C. (N. Y.) 373; *Marshall v. Davies*, 78 N. Y. 414; S. C. 58 How. Pr. 231; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Mutual L. Ins. Co. v. Davies*, 44 N. Y. Superior Ct. 172; *Comstock v. Drohan*, 8 Ib. 373; S. C. 71 N. Y. 9; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438; *Burr v. Beers*, 24 N. Y. 178;

Thorp v. Keokuk Coal Co. 48 N. Y. 253; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Johnson v. Zink*, 52 Ib. 396; *Ayers v. Dixon*, 78 N. Y. 318; *Marsh v. Pike*, 10 Paige (N. Y.), 595, 596; *Willson v. Burton*, 52 Vt. 394; *Crenshaw v. Thackston*, 14 S. C. 437; *Flagg v. Geltmacher*, 98 Ill. 293.

⁴ *Corbett v. Waterman*, 11 Iowa, 86; *Thompson v. Bertram*, 14 Iowa, 476; *James v. Day*, 37 Iowa, 164; *Hebert v. Doussan*, 8 La. Ann. 267; *Waters v. Hubbard*, 44 Conn. 340.

⁵ *Tripp v. Vincent*, 3 Barb. (N. Y.) Ch. 613.

⁶ *Paine v. Jones*, 76 N. Y. 274; *Mutual L. Ins. Co. v. Davies*, *supra*.

⁷ *Paine v. Jones*, 14 Hun (N. Y.), 577.

valuable privilege which the mortgagor had provided as to the mode of discharging the debt ; but however that may be, it is the settled rule that the court will not inquire whether the alteration be beneficial or injurious to the surety, if it be a material one.¹

742. When extension discharges the mortgagor. — A purchaser having assumed the payment of an existing mortgage, and thereby become the principal debtor and the mortgagor a surety of the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it. The holder cannot enlarge the time of payment and protect himself, by reserving his rights against the surety in the agreement of extension. Such a reservation has no effect unless the mortgagor agree to it.²

If the mortgagor request the mortgagee upon the maturity of the mortgage to foreclose it, on the ground that the premises are then sufficient to satisfy the mortgage, but might depreciate so as to become inadequate, the mortgagor will not be liable for a deficiency which occurs through the mortgagee's neglect to comply with such request.³

But the mere neglect of the holder of a mortgage to enforce it, when he has not been requested to do so, does not discharge one who has become a surety or guarantor of the mortgage debt, though the land depreciates so as to be inadequate to pay it.⁴

But when the purchaser has assumed no personal liability to the mortgagor which the latter can enforce, the purchaser is in no sense the surety of his vendor ; and an extension of the time of payment made between the mortgagor and the mortgagee does not release or discharge the lien of the mortgage upon the land in favor of the purchaser.⁵

In other courts, however, it is held that the relation of surety between the grantor and the grantee does not in any case involve the mortgagee in its legal effects. His rights are held to remain unchanged. Both the mortgagor, and the purchaser who has assumed the mortgage, are as to him principals ; and he may have a personal decree against either or both. The obligation of the

¹ Per Gilbert, J., in *Paine v. Jones*, *supra*.

² § 942; *Calvo v. Davies*, 8 Hun (N. Y.), 222; affirmed 73 N. Y. 211; *Metz v. Todd*, 36 Mich. 473.

³ *Remsen v. Beekman*, 25 N. Y. 552; *Russell v. Weinberg*, 2 Abb. N. C. (N. Y.) 423.

⁴ *Hurd v. Callahan*, 9 Abb. N. C. (N. Y.) 374.

⁵ *Maher v. Lanfrom*, 86 Ill. 513.

purchaser is treated as a collateral obligation, which the creditor is entitled to the benefit of. In short, the relation of suretyship exists between the grantor, and the grantee who assumes the payment of the mortgage, but it does not affect the relations of the mortgagor and mortgagee.¹ The contract rights of the mortgagee cannot be changed by acts of the mortgagor and his grantee to which the former is not a party. "He may therefore continue to hold the mortgagor as a principal debtor, and while he so holds him, there can be no discharge of liability on the ground of indulgence to one who, for certain purposes not affecting the creditor, stands toward the original debtor in the relation of a principal to his surety."²

743. A purchaser of a portion of the mortgaged premises, who assumes the payment of a proportionate part of the mortgage debt, is bound to pay such part in exoneration of the residue.³

A purchaser of part of a tract of land, who pays off a mortgage upon the whole, is entitled to be subrogated to the mortgage;⁴ because the burden of such a mortgage rests only in part upon his land, and is in part to be borne by the owners of the remaining portions of it. But, on the other hand, if one purchase a portion of the mortgaged premises, under an agreement that he will assume and pay the whole of the mortgage debt, then the whole burden of the debt is annexed to that portion by express contract.⁵

A purchaser of a portion of the estate subject to a mortgage has no equity to have his land relieved from the burden of the mortgage, as against a subsequent purchaser, when it was a part of his contract of purchase that he should pay the purchase money directly in satisfaction of the mortgage. On the contrary, the subsequent purchaser has an equitable right to have the purchase money so applied in exoneration of his own land; and as against

¹ Corbett v. Waterman, 11 Iowa, 86; Crawford v. Edwards, 33 Mich. 354; Huyler v. Atwood, 26 N. J. Eq. 504; Connecticut Mut. Life Ins. Co. v. Mayer, 8 Mo. App. 18; Meyer v. Lathrop, 10 Hun (N. Y.), 66; but the latter case is overruled by Paine v. Jones, 14 Hun (N. Y.), 577. See Sohler v. Loring, 6 Cush. (Mass.) 537.

² Connecticut Mut. Life Ins. Co. v. Mayer, *supra*, per Lewis, P. J.

³ Torrey v. Bank of Orleans, 9 Paige (N. Y.), 649; S. C. 7 Hill (N. Y.), 260; Hilton v. Bissell, 1 Sandf. (N. Y.) Ch. 407; Ayers v. Dixon, 78 N. Y. 318; Harlem Savings' Bank v. Mickelsburgh, 57 How. (N. Y.) Pr. 106.

⁴ Salem v. Edgerly, 33 N. H. 46; Champlin v. Williams, 9 Pa. St. 341.

⁵ Welch v. Beers, 8 Allen (Mass.), 151.

him a subsequent agreement between the mortgagor and the first purchaser making a different application of the purchase money is invalid.¹

744. The purchaser is not allowed to defend against the mortgage he has assumed to pay, on the ground that it was made without consideration, or that the consideration has failed, and therefore is not valid against his grantor; for the latter having appropriated a portion of the purchase price of the land to the payment of a sum of money to a third person, and made it a charge upon the land, it does not matter whether there was any legal obligation upon him to pay it, or whether it was at the time of the sale a lien upon the land; his grantee, having undertaken to pay it, is precluded from assailing its validity.²

One who has assumed the payment of a mortgage cannot contest the validity of it, or show that the amount assumed by him is not due upon it;³ or that the mortgagee has collateral security for the same debt;⁴ or that the debt is different, or is payable in a manner different, from its terms.⁵ He cannot object to the mortgage on the ground of an alleged defect in the manner of execution, as that it was executed by an attorney whose authority is not shown, when the mortgagor himself does not interpose that objection.⁶

Although the consideration of the mortgage assumed has not been fully paid, the grantee cannot redeem except by paying the mortgage in full. Thus, where a mortgage was given to secure a loan and certain advances which the mortgagee agreed to make, one claiming under the grantee sought to redeem on paying the amount of the loan secured, without the advances, which had not at that time been made; and in fact the condition on which they were to be made had not been performed; but it was determined

¹ *Baring v. Moore*, 4 Paige (N. Y.), 166.

² *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Haile v. Nichols*, 16 Hun (N. Y.), 37; *Parkinson v. Sherman*, 74 N. Y. 88.

³ *Ritter v. Phillips*, 53 N. Y. 586; *Johnson v. Parmely*, 14 Hun (N. Y.), 398; *Scarry v. Eldridge*, 63 Ind. 44; S. C. 7 Cent. L. J. 418; *Kennedy v. Brown*, 61 Ala. 296; *Green v. Houston*, 22 Kans. 35. See, however, *Mansur v. Bartholomew* (Superior Court, Ind. 1878), 8 Cent. L. J. 72, where action was by mortgagee.

⁴ *Ferris v. Crawford*, 2 Den. (N. Y.) 595.

⁵ *Klein v. Isaacs*, 8 Mo. App. 568.

⁶ *Pidgeon v. Trustees of Schools*, 44 Ill. 501; *Greither v. Alexander*, 15 Iowa, 470. In *Goodman v. Randall*, 44 Conn. 321, it was held that a purchaser who had expressly assumed a mortgage described for a certain amount was not estopped to show that the incumbrance had no existence in fact, the mortgage having been witnessed, acknowledged, delivered, and recorded without being signed by the mortgagor. This part of the decision seems to be against authority and reason.

that the plaintiff must pay the amount of the mortgage in full in order to redeem, and that the mortgagee would hold the balance above the amount advanced by him in trust for the mortgagor, or for the holder of the agreement for the advances, when that had been assigned.¹

Even one who has bought subject to a mortgage, without assuming the payment of it so as to make himself personally liable, cannot contest the validity of the mortgage lien. When the amount of the mortgage has been deducted from the amount of the consideration of the purchase, it is in effect an agreement that so much of the purchase money shall be paid to the person holding the mortgage, and the mortgage is thus made a lien to the full amount of its face, although the mortgagee has, in fact, paid only a part of the consideration, or although the mortgage is subject to other defences in the hands of the mortgagor. By conveying the land subject to a mortgage, the mortgagor provides for its payment in full out of the purchase money.² A purchaser of land upon execution, "subject to whatever sum might be due upon the property by virtue of a certain mortgage," cannot dispute the fact of the mortgage or its validity.³

If a clause whereby a grantee is made to assume an existing mortgage be inserted in a deed through the mistake of the scrivener, and the deed be accepted by the grantee in ignorance thereof, he may have the deed reformed by striking out such clause.⁴ But a purchaser who has made payments of interest upon a mortgage without complaining of the assumption clause in his deed, will not be heard afterwards to urge in defence that this clause was fraudulently inserted in his deed.⁵

Of course the parties may, by agreement, release a purchaser from his assumption of a mortgage.⁶

745. Such a purchaser cannot set up usury in the mortgage assumed by him.⁷ But one who buys land with the expressed in-

¹ *Cox v. Hoxie*, 115 Mass. 120.

² *Freeman v. Auld*, 44 N. Y. 50; *S. C.* 37 Barb. 587, and cases cited; *Hardin v. Hyde*, 40 Barb. (N. Y.) 435. See, however, *Hartley v. Tatham*, 2 Abb. (N. Y.) App. Dec. 333; *S. C.* 10 Bosw. 273, holding that such grantees may show part payment of the mortgage. *Foster v. Wightman*, 123 Mass. 100; *Manwaring v. Powell*, 40 Mich. 371. See §§ 736, 746, 1303.

³ *Conkling v. Secor Sewing Machine Co.* 55 How. (N. Y.) Pr. 269

⁴ *O'Neill v. Clark*, 33 N. J. Eq. 444.

⁵ *Miller v. Thompson*, 34 Mich. 10; or when the purchaser has afterwards recognized the mortgage by an agreement with the mortgagee for forbearance. *Smith v. Graham*, 34 Mich. 302. See § 738.

⁶ *O'Neill v. Clark*, 33 N. J. Eq. 444.

⁷ *De Wolf v. Johnson*, 10 Wheat. 367, 392; *Cramer v. Lepper*, 26 Ohio St. 59; *Busby v. Finn*, 1 Ib. 409; *Bearce v. Barstow*, 9 Mass. 45; *Hartley v. Harrison*, 24 N. Y. 170, and cases cited; *Sands v.*

tention on his part, and on the part of the grantor, to avoid a previous mortgage on the ground of usury, may take this defence.¹ When the purchaser has in no way agreed to pay the mortgage debt, or agreed that it should be paid out of the land, he may take advantage of usury in the mortgage to avoid it.² And so where an absolute deed had been made of an equity of redemption, but in fact as security, and the grantee did not assume the mortgage, but afterwards, upon reconveying the property to the wife of the former owner, he inserted, without their knowledge, a clause by which the wife assumed and agreed to pay the mortgage, it was held that inasmuch as this grantor was under no liability to pay the mortgage, the clause whereby the grantee assumed the mortgage was of no effect, and such grantee was not estopped from setting up the defence of usury.³

A voluntary assignee of the mortgagor for payment of his debts may set up usury in the mortgage.⁴

746. When a purchaser may contest the mortgage.— But one who has bought the equity of redemption by a deed with covenants of warranty has a right to prove a payment by the mortgagor, by which the land is relieved wholly or in part from the incumbrance.⁵ When the description of the premises as subject to a mortgage is merely for the purpose of protecting the grantor from liability upon his covenants, the grantee is not charged with the payment of the mortgage debt. Accordingly it is held that a recital in a deed containing covenants of warranty that the property is subject to a mortgage, which is excepted out of the covenants in the deed, does not estop the grantee to dispute the validity of the mortgage.⁶

And so if one purchases land from a mortgagor without any deduction from the price on account of an incumbrance upon it, the purchaser may interpose the same defences that the mortgagor himself might have. Equity and good conscience demand

Church, 6 N. Y. 347; Shufelt v. Shufelt, 9 Paige (N. Y.), 137; Cope v. Wheeler, 41 N. Y. 303; Root v. Wright, 21 Hun (N. Y.), 344; Ritter v. Phillips, 53 N. Y. 586; Barthel v. Elias, 2 Abb. (N. Y.) N. C. 364; Frost v. Shaw, 10 Iowa, 491.

¹ Newman v. Kershaw, 10 Wis. 333; Ludington v. Harris, 21 Wis. 239.

² Maher v. Lanfrom, 86 Ill. 513.

³ Smith v. Cross, 16 Hun (N. Y.), 487. To like effect, Stevens Institute v. Sheridan, 30 N. J. Eq. 23; S. C. 7 Reporter, 245.

⁴ Pearsall v. Kingsland, 3 Edw. (N. Y.) 195.

⁵ § 644; Williams v. Thurlow, 31 Me. 392. See Hartley v. Tatham, 2 Abb. (N. Y.) Dec. 333; S. C. 1 Keyes, 222; 10 Bosw. 273.

⁶ §§ 736, 744; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554. The grantor in this case was not the mortgagor, though this fact was not noticed in the opinion. See § 744.

§§ 747-748.] A PURCHASER'S RIGHTS AND LIABILITIES.

that when the mortgagor conceals the existence of the incumbrance, and his grantee purchases without actual notice, he should be permitted to set up any defence there may be to the validity of the mortgage. In such case the purchaser is authorized to interpose the defence of usury.¹

747. A purchaser at execution sale of land incumbered by a mortgage which the judgment debtor had in his deed of purchase expressly agreed to pay, succeeds merely to the debtor's rights in the property, and is estopped, as the debtor was, from denying the validity of such mortgage.² Where by statute only incumbered land can be sold on execution, an execution in other cases being levied upon the land, a purchaser of an equity of redemption on execution is estopped to deny the existence and validity of the mortgage, because he bought only an equity of redemption, and if there is no mortgage there can be no such equity. When, however, there are more mortgages than one, if any of them are fraudulent, or void, or fully paid, the purchaser on execution may contest such and redeem from the valid incumbrances.³

747 a. — A grantee who has not agreed to pay the mortgage debt is not affected by an agreement to do so made by his grantor. But after the first grantee has covenanted to pay the mortgage debt, a like covenant in his deed to the second grantee makes the latter personally liable to pay it, in exoneration of the mortgagor, who is in equity entitled to the benefit of such undertaking, in the same manner as if it had been recited in a conveyance by him directly to the second grantee.⁴

3. *Personal Liability of Purchaser.*

748. A deed which is merely made subject to a mortgage specified does not alone render the grantee personally liable for the mortgage debt. To create such liability there must be such words as will clearly import that the grantee assumed the obligation of paying the debt.⁵ It is not necessary that any particular

¹ *Maher v. Lanfrom*, 86 Ill. 513.

² *Kennedy v. Brown*, 61 Ala. 296.

³ *Stebbins v. Miller*, 12 Allen (Mass.), 591. See *Russell v. Dudley*, 3 Met. (Mass.) 147-151, per Shaw, C. J.

⁴ *Torrey v. Bank of Orleans*, 9 Paige (N. Y.), 649.

⁵ § 738; *Weed Sewing Machine Co. v.*

Emerson, 115 Mass. 554; *Strong v. Converse*, 8 Allen (Mass.), 557; *Drury v. Tremont Improvement Co.* 13 Ib. 168, 171; *Bumgardner v. Allen*, 6 Munf. (Va.) 439; *Foster v. Atwater*, 42 Conn. 244; *Walker v. Goldsmith*, 7 Oregon, 161; *Fowler v. Fay*, 62 Ill. 375; *Comstock v. Hitt*, 37 Ill. 542, 546; *Dunn v. Rodgers*, 43 Ill. 260;

formal words should be used,¹ but that the intention to impose upon the grantee this obligation should clearly appear.² The intention will be sought from the whole instrument, and any inconsistent part will be rejected or modified according to the intent of the whole. Thus in a clause, "subject, nevertheless, to a certain mortgage, which the party hereto of the *first* part assumes and agrees to pay as part of the consideration hereinbefore expressed," the word *first* will be construed to read and mean *second*, and the clause will constitute an agreement by the grantee to pay the mortgage.³

In case the terms of the deed leave it doubtful whether the grantee is personally bound to pay an existing incumbrance, evidence of the value of the premises or of the agreed consideration for them, as also evidence as to whether the grantee retained any of the consideration to pay the debt, is admissible to aid in construing the deed.⁴

A purchaser of land accepting a deed expressly conveying it subject to a mortgage, and excepting it from the covenants, is not himself personally liable to pay it, unless he covenants to do so. The land in such case is primarily liable as between the vendor and purchaser; and the vendor is liable for any deficiency after a foreclosure sale fairly made.⁵ A personal judgment cannot be rendered against a subsequent purchaser who has not assumed the payment of a mortgage, although in a foreclosure suit he answers that he is ready and willing to redeem and to bring the money into court.⁶

If a purchaser by collusion with the mortgagee buy the land at the foreclosure sale for a sum less than its value, and less than the mortgage debt, the vendor may have the sale set aside; and such collusion would be a defence in a suit against him for the deficiency.⁷

Collins v. Rowe, 1 Abb. (N. Y.) N. C. 97; *Trotter v. Hughes*, 12 N. Y. 74; *Belmont v. Coman*, 22 N. Y. 438; *Binsse v. Paige*, 1 Keyes (N. Y.), 87; S. C. 1 Abb. App. Dec. 138; *Stebbins v. Hall*, 29 Barb. (N. Y.) 524; *Tillotson v. Boyd*, 4 Sandf. (N. Y.) 516; *Murray v. Smith*, 1 Duer (N. Y.), 412; *Johnson v. Monell*, 13 Iowa, 300; *Hull v. Alexander*, 26 Iowa, 569; *Lewis v. Day*, 53 Iowa, 575; *Winans v. Wilkie*, 41 Mich. 264; *Tanguay v. Felthausen*, 45 Wis. 30; *Campbell v. Patter-*

son, 58 Ind. 66; *Moore's Appeal*, 88 Pa. St. 450; S. C. 19 Alb. L. J. 257.

¹ *Belmont v. Coman*, 22 N. Y. 438.

² *Stebbins v. Hall*, 29 Barb. (N. Y.) 524.

³ *Fairchild v. Lynch*, 42 N. Y. Superior Ct. 265.

⁴ *Winans v. Wilkie*, 41 Mich. 264.

⁵ *Johnson v. Zink*, 51 N. Y. 333; *Comstock v. Hitt*, 37 Ill. 542; *Gayle v. Wilson*, 30 Gratt. (Va.) 166.

⁶ *Tanguay v. Felthausen*, 45 Wis. 30.

⁷ *Cleveland v. Southard*, 25 Wis. 479.

When the mortgage has been thus assumed by a purchaser he may be made a party to a proceeding to foreclose, and a personal judgment had against him; or he may be sued on his personal liability without any proceeding to foreclose.¹

It is unusual for the grantor to take any note or other security from a grantee who has assumed the payment of a mortgage; but if notes be taken for the amount of the debt assumed, in the absence of fraud or undue advantage on the part of the grantor, a court of equity will not compel the surrender of the notes, or inquire into the authority of the grantor's agent who took them, but will leave the purchaser to his remedy at law.²

The assumption of the mortgage covers all the incidents of the mortgage debt, as, for instance, a stipulation for the payment of an attorney's fee in case of a foreclosure.³

Although a stipulation in a deed for the assumption of a mortgage may be absolute and certain, the effect of it may be modified by a contemporaneous agreement of the parties; such, for instance, as an agreement that the grantor may within a certain time demand a reconveyance of the property subject to the same incumbrances.⁴

The agreement to pay an existing mortgage may be made by a separate writing, as, for instance, in the agreement to purchase, and in such case the liability of the vendor is not affected by the fact that at his request the deed is made to his wife.⁵

749. An agreement that the amount of a mortgage upon the granted premises shall be paid as a part of the purchase money is in effect an assumption to pay the mortgage, and not merely a taking of the property subject to the mortgage. The mortgage in such case is charged upon the purchase money, and not upon the land merely.⁶ So much of the consideration as is

¹ *Thompson v. Bertram*, 14 Iowa, 476; *Corbett v. Waterman*, 11 Iowa, 86; *Moses v. Dallas Dist. Court*, 12 Iowa, 139; *Burr v. Beers*, 24 N. Y. 178.

² *Dorr v. Peters*, 3 Edw. (N. Y.) 132.

³ *Johnson v. Harder*, 45 Iowa, 677.

⁴ *Gaffney v. Hicks*, 124 Mass. 301.

⁵ *Pike v. Seiter*, 15 Hun (N. Y.), 402.

⁶ *Heid v. Vreeland*, 30 N. J. Eq. 591; *Thayer v. Torrey*, 37 N. J. L. 339; *Tichenor v. Dodd*, 3 Green (N. J.) Ch. 454; *Kennedy v. Brown*, 61 Ala. 296; *Urquhart v. Brayton*, 12 R. I. 169. In the latter case the terms of the mortgage

were, "subject to the payment of a certain mortgage, &c., which said mortgage, or the amount thereof, is computed as so much of the consideration to be paid."

In *Heid v. Vreeland*, *supra*, the Vice Chancellor says: "There can be no doubt at this day that where the purchaser of land incumbered by a mortgage agrees to pay a particular sum as purchase money, and on the execution of the contract of purchase the amount of the mortgage is deducted from the consideration, and the land conveyed subject to the mortgage, that the purchaser is bound to

requisite to pay the mortgage is taken from the consideration, and appropriated by the parties to the payment of the mortgage, and equity raises upon the conscience of the purchaser an obligation to indemnify the mortgagor against the mortgage debt. If he be compelled to pay it, he may in equity compel the purchaser to refund the money so paid. There is an implied promise on the part of the purchaser to pay the mortgage when it is due, or if it be already due, to pay it forthwith, or within a reasonable time;¹ and the burden of proof is upon the purchaser who has assumed a mortgage and claims that he has performed his obligation, to show that he has done so.²

A stipulation that the conveyance is made "subject to the payment" of an outstanding mortgage, or any equivalent expression which clearly implies an obligation intentionally created by the one party and assumed by the other, will constitute a personal obligation for its payment.³ The Supreme Court of Pennsylvania in a late case regarded these words as implying a contract of indemnity merely between the vendor and vendee, in the absence of special circumstances from which a personal liability to pay the incumbrance to the mortgagee could be implied. In the case before the court, however, there was no personal liability on the part of the vendor to pay the mortgage, this having been given by his vendor; and this fact was sufficient to exempt the last vendee from any personal liability for the mortgage.⁴

pay the mortgage debt whether he agreed to do so by express words or not. This obligation results necessarily from the very nature of the transaction. Having accepted the land subject to the mortgage, and kept back enough of the vendor's money to pay it, it is only common honesty that he should be required either to pay the mortgage or stand primarily liable for it. His retention of the vendor's money for the payment of the mortgage imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so even according to the lowest notions of justice, for it would seem to be almost intolerably unjust to permit him to keep back the vendor's debt and still be free from all liability for a failure to apply the money according to his promise."

See, however, *Belmont v. Coman*, 22 N. Y. 438.

¹ *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Smith v. Truslow*, 84 N. Y. 660.

² *Jewett v. Draper*, 6 Allen (Mass.), 434.

³ *Stebbins v. Hall*, 29 Barb. (N. Y.) 524; *Carley v. Fox*, 38 Mich. 387.

⁴ *Moore's Appeal*, 88 Pa. St. 450; *S. C.* 7 Reporter, 538. Also *Samuel v. Peyton*, 88 Pa. St. 465; *Davis's App.* 89 Pa. St. 272; *Merriman v. Moore*, 90 Pa. St. 78; *Taylor v. Mayer*, 93 Pa. St. 42. These cases arose before the passage of the present statute in Pennsylvania, which is as follows: A grantee of real estate which is subject to ground rent, or bound by mortgage or other incumbrance, shall not be personally liable for the payment of such ground rent, mortgage, or other incumbrance, unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor, or there shall be express words in the deeds of conveyance

But a promise on the part of a grantee to pay a mortgage upon the property cannot be implied from a statement in the deed "subject, however, to a mortgage . . . of \$7,000, which is part of the above-named consideration." These words do not necessarily imply any obligation to pay the mortgage debt. They are rather to be considered as additional words of recital or description.¹

Nor can such a promise be implied from a clause following a description of two mortgages upon the property, stating that "the above described property is alone to be holden for the payment of both of the above debts;" though there also be an exception to the covenant against incumbrances of the mortgages referred to, "which are a part consideration of this deed." The language at best is doubtful and ambiguous, and is susceptible of a meaning other than that the grantee assumed a personal obligation to pay the mortgages. The language is chosen by the grantor, and it is within his power to express an obligation of the grantee in plain and intelligible language, if any such obligation has been agreed upon.²

750. Even a verbal promise by a purchaser to assume and pay a mortgage is valid, and may be enforced in equity not only by the grantor but by the holder of the mortgage.³ A covenant in the deed that the premises are free from incumbrances, or a recital that the consideration had been paid in full, does not estop either the grantor or the holder of the mortgage from proving the agreement and recovering upon it.⁴ The contract of assumption is independent of the deed. The verbal agreement is additional thereto, and in no respect contradictory. It does not vary the terms of the contract, and is not merged therein.⁵

stating that the grant is made on condition of the grantee assuming such personal liability: provided, that the use of the words "under and subject to the payment of such ground rent, mortgage, or other incumbrance," shall not alone be so construed as to make such grantee personally liable as aforesaid. The right to enforce such personal liability shall not enure to any person other than the person with whom such an agreement is made, nor shall such personal liability continue after the said grantee has *bonâ fide* parted with the incumbered property, unless he shall have expressly assumed such con-

tinuing liability. Purdon's Ann. Dig. 1877, p. 2160, §§ 5, 6.

¹ Fiske v. Tolman, 124 Mass. 254.

² Hubbard v. Ensign, 46 Conn. 576.

³ Bolles v. Beach, 22 N. J. L. (2 Zab.) 680; Wilson v. King, 23 N. J. Eq. 150; Putney v. Farnham, 27 Wis. 187; Lamb v. Tucker, 42 Iowa, 118; Merriman v. Moore, 90 Pa. St. 78. See § 1715.

⁴ Wilson v. King, *supra*; Bowen v. Kurtz, 37 Iowa, 239. As to evidence of verbal assumption, see Conover v. Brown, 29 N. J. Eq. 510.

⁵ Taintor v. Hemmingway, 18 Hun (N. Y.), 458; Murray v. Smith, 1 Duer (N.

The owner of a large lot of land, subject to a mortgage, conveyed a portion of it with covenants of warranty against the mortgage. Subsequently the grantee offered to purchase the residue at a stated price, and to assume as part of it the debt secured by the mortgage, and to pay the balance in money. This offer was accepted, and a deed given in which the consideration named was simply the value of the equity of redemption, and which conveyed the land subject to the mortgage, and contained a general covenant against incumbrances except this mortgage. The purchaser thus took the land last purchased, subject to the mortgage. The deed did not state that he assumed the debt, nor did it have any provision to that effect, and therefore the mere acceptance of the deed did not make him personally liable to pay the debt or discharge the incumbrance. In the absence of other evidence, he merely purchased the equity of redemption. But having by his proposal to purchase assumed the payment of the mortgage, it became his duty to the grantor to pay it. Moreover, the grantor was released by this agreement from the covenant of his first deed against the mortgagee.¹

The agreement of a purchaser to pay a mortgage may be wholly outside of the conveyance.² A letter of a second mortgagee to the holder of the prior mortgage, which was due, saying that he was willing to agree to see him paid \$500 on account of the first mortgage within sixteen months, was held a promise to pay this sum.³

751. Whenever the mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any covenant or agreement to pay it, he is bound to the extent of the property to indemnify the grantor. The law implies a promise to that effect from the nature of the transaction.⁴ The obligation of a purchaser of an equity of redemp-

Y.), 413; *Barker v. Bradley*, 42 N. Y. 316; *Remington v. Palmer*, 62 N. Y. 31.

¹ *Drury v. Tremont Improvement Co.* 13 Allen (Mass.), 168.

² *Schmucker v. Sibert*, 18 Kans. 104.

³ *Colgin v. Henley*, 6 Leigh (Va.), 85.

⁴ *Townsend v. Ward*, 27 Conn. 610; *Dorr v. Peters*, 3 Edw. (N. Y.) 132; *Marsh v. Pike*, 1 Sandf. (N. Y.) Ch. 210; *Blyer v. Monholland*, 2 Ib. 478; *Ferris v. Crawford*, 2 Den. (N. Y.) 595; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Cornell*

v. Prescott, 2 Barb. (N. Y.) 16; *Scott v. Featherston*, 5 La. Ann. 306; *Schlatre v. Greaud*, 19 Ib. 125; *Thompson v. Thompson*, 4 Ohio St. 333; *Stevenson v. Black*, 1 N. J. Eq. (Sax.) 338; *Klapworth v. Dressler*, 13 N. J. Eq. (2 Beas.) 62; *Hartshorne v. Hartshorne*, 2 N. J. Eq. (1 Gr.) 349; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Moore's Appeal*, 88 Pa. St. 450; S. C. 19 Alb. L. J. 257; *Burke v. Gummy*, 49 Pa. St. 518; *Wood v. Smith*, 51 Iowa, 156.

tion is thus stated by Lord Eldon :¹ "If he enters into no obligation with the party from whom he purchases, neither by bond nor covenant of indemnity, to save him harmless from the mortgage, yet this court, if he receives possession and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage." But the purchaser in such case does not assume any liability beyond the value of the land conveyed to him. If the mortgage debt be afterward paid by the mortgagor, equity will compel the purchaser to refund the money so paid, or to give up the property. He may discharge his obligation to indemnify the mortgagor by releasing the lands to him.² The obligation to indemnify the mortgagor in such case differs from that imposed upon the purchaser by an agreement to assume the mortgage debt, in that such agreement makes him personally liable to the mortgagor to indemnify him, whether the mortgaged property be sufficient in value for that purpose or not. He incurs a personal liability. As between him and his grantor he becomes the principal debtor, and the vendor a surety.³ But the purchaser, by his assumption of the debt, does not generally make himself liable at law to any one other than his grantor. His covenant to pay is considered only as a covenant to indemnify his grantor. It does not even create a debt as between his personal representative and the heir or devisee; and consequently the land is the primary fund, and the personal estate only the auxiliary fund for its payment.⁴ The case is in this respect quite different from one where the ancestor has purchased an estate and given his own mortgage and personal obligation to secure the payment of purchase money, for then the debt is a personal debt in every sense, and his personal estate is the primary fund for the payment of it, in exoneration of the land and the interest of the heirs.⁵

752. The grantee is bound by accepting the deed. To create a liability on the part of the grantee to pay an existing

¹ Waring v. Ward, 7 Ves. 332.

² Tichenor v. Dodd, 4 N. J. Eq. (3 Gr.) 454; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, 655; Mount v. Van Ness, 33 N. J. Eq. 262, 265.

³ Crowell v. Hospital of St. Barnabas, *supra*.

⁴ Mount v. Van Ness, 33 N. J. Eq. 262.

⁵ Crowell v. Hospital of St. Barnabas, *supra*, 653, per Depue, J.; Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229.

mortgage, it is not necessary that he should sign the deed or any obligation;¹ his acceptance of a deed imposing this obligation upon him is all that is necessary.² The acceptance by an agent duly constituted of a deed imposing such a liability will bind the principal.³ But if there be no acceptance, as, for instance, when the deed containing an assumption of a mortgage is made to a married woman without her knowledge or consent, and is never delivered to her,⁴ or when a deed is made to a person without his knowledge or consent, and he repudiates it as soon as he knows of its existence,⁵ no liability is incurred by the grantee.

By the acceptance of a deed which provides that the grantee shall assume and pay a specified mortgage, he binds himself as effectually as he would by executing the deed himself as an indenture.⁶ This provision becomes an express agreement on his part, for the fulfilment of which he is personally liable, not only to his grantor, but the benefit of it enures to the mortgagee, who may in equity enforce it directly against such purchaser.⁷ When foreclosure is made by an equitable suit, the mortgagee may treat both the vendor and purchaser as principal debtors to him, and may have a personal decree against either or both of them.

It is not necessary that the holder of the mortgage should notify the purchaser who has assumed the mortgage of his acceptance of the promise to pay the debt. The bringing of suit is a sufficient acceptance.⁸

¹ *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, and cases cited; *Ricard v. Sander-son*, 44 N. Y. 179; *Locke v. Homer*, 131 Mass. 93, 102.

² *Spaulding v. Hallenbeck*, 35 N. Y. 204, affirming 39 Barb. 79; 30 Ib. 292; *Wales v. Sherwood*, 1 Abb. (N. Y.) N. C. 101, note; *Bishop v. Douglass*, 25 Wis. 696; *Taylor v. Whitmore*, 35 Mich. 97; *Unger v. Smith*, 44 Mich. 22; *Klein v. Isaacs*, 8 Mo. App. 568; *Dickason v. Williams*, 129 Mass. 182; *Urquhart v. Brayton*, 12 R. I. 169.

³ *Fairchild v. Lynch*, 42 N. Y. Superior Ct. 265; S. C. 46 Ib. 1.

⁴ *Culver v. Badger*, 29 N. J. Eq. 74.

⁵ *Cordis v. Hargrave*, 29 N. J. Eq. 446; *Stevens Institute of Technology v. Sheridan*, 30 N. J. Eq. 23. See § 738.

⁶ *Crawford v. Edwards*, 33 Mich. 354; *Trotter v. Hughes*, 12 N. Y. 74, 78; *Fair-*

child v. Lynch, 46 N. Y. Superior Ct. 1; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Finley v. Simpson*, 22 N. J. L. (2 Zab.) 311; *Schmucker v. Sibert*, 18 Kans. 104; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Bramar v. Dowse*, 12 Ib. 227; *Locke v. Homer*, 131 Mass. 93; *Furnas v. Durgin*, 119 Mass. 500; *Gaffney v. Hicks*, 131 Mass. 124.

⁷ *Hoff's Appeal*, 24 Pa. St. 200; *Len-nig's Estate*, 52 Pa. St. 135, 138; *Craw-ford v. Edwards*, *supra*; *Blyer v. Mon-holland*, 2 Sandf. (N. Y.) Ch. 478; *Cor-bett v. Waterman*, 11 Iowa, 86; *Thomp-son v. Bertram*, 14 Iowa, 476; *Curtis v. Tyler*, 9 Paige (N. Y.), 432, 435; *King v. Whitely*, 10 Ib. 465; *Halsey v. Reed*, 9 Ib. 446, 451; *Burr v. Beers*, 24 N. Y. 178; *Converse v. Cook*, 8 Vt. 164.

⁸ *Bissell v. Bugbee* (U. S. C. C. Dist. Ind.), 8 Cent. L. J. 272; S. C. 7 Reporter,

§§ 753, 754.] A PURCHASER'S RIGHTS AND LIABILITIES.

A verbal agreement between the parties that the grantor should advance the money for the payment of a mortgage expressly assumed by the grantee cannot be shown, because this would be inconsistent with the terms of the deed.¹

753. A married woman is liable on her covenant to assume a mortgage made in a deed of real estate to her own separate use or benefit. It is a covenant for the benefit of her separate estate, or to pay a portion of the purchase money of real estate conveyed to her.² But she is not liable on such a covenant in her husband's deed of his land, where the laws enable her to contract only in respect to her own property; and she can consequently contract no liability as surety for her husband.³

A deed, containing a recital that the land therein described was subject to a mortgage, "which the grantee assumes and agrees to pay," was executed to a woman as grantee, without her knowledge or authority, by the direction of her husband, and was by him recorded. She never saw the deed and knew nothing of its contents until after the land was sold by the mortgagee, when she repudiated the deed. Soon after the deed was recorded, she knew that the land had been conveyed to her and claimed to be the owner of it. It was held, however, that these facts warranted a finding that she had assented to the purchase, and a ruling that she was bound by the recital in the deed.⁴

754. What will avoid the purchaser's liability. — Such purchaser cannot avoid the liability to pay the mortgage, on the ground that through a mistake in the description he acquired no legal title to the land intended to be conveyed, if he obtained possession of it under his deed, and the right by virtue of it to have the mistake corrected.⁵ But it is a good defence that the purchaser's grantor had no title to the property; and that he assumed the payment of the mortgage through the false and fraudulent representations of his grantor; ⁶ or that there was no agreement for assumption between the parties to the deed, and

550. See, however, *Mansur v. Miller* (Superior Court Marion Co. Ind. 1878), 7 Cent. L. J. 422.

¹ *Unger v. Smith*, 44 Mich. 22.

² § 116; *Vrooman v. Turner*, 8 Hun (N. Y.), 78; S. C. 69 N. Y. 280; examined and commented upon in 17 Alb. L. J. 240; *Ballin v. Dillaye*, 37 N. Y. 35; *Cashman v. Henry* 75 N. Y. 103; S. C. 19 Albany

L. J. 24; 55 How. (N. Y.) Pr. 234, reversing S. C. 44 Superior Ct. 93; *Hayler v. Atwood*, 26 N. J. Eq. 504; S. C. 28 Ib. 275.

³ *Kitchell v. Mudgett*, 37 Mich. 81.

⁴ *Coolidge v. Smith*, 129 Mass. 554.

⁵ *Crawford v. Edwards*, 33 Mich. 354; *Comstock v. Smith*, 26 Mich. 306.

⁶ *Benedict v. Hunt*, 32 Iowa, 27.

the agreement was inserted in the deed in an unusual place and escaped the notice of the grantee.¹

755. The ground upon which a mortgagee is allowed to take advantage directly of the usual clause in a deed, whereby the grantee assumes the payment of the mortgage, is generally stated to be that as between the parties to the deed the grantee thereby becomes the principal debtor for the mortgage debt, which has been allowed to him out of the purchase money, and the grantor is thenceforward merely a surety for the debt;² and then, upon the familiar principle that the creditor is entitled by way of equitable subrogation to all securities held by a surety of the principal debtor, the mortgagee is entitled to the benefit of this agreement made by the purchaser, although he did not know of its existence till long afterwards. A court of equity having the mortgagor, the mortgagee, and the grantee before it, may adjust in one suit the rights of all the parties. In different forms this is in substance the doctrine of the cases.³ The right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the acceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. The mortgagee's relief depends upon no original equity residing in himself, but upon the right of the mortgagor against his grantee, to which the mortgagee succeeds. Then he is allowed in equity to recover a deficiency of the grantee by a mere rule of procedure, going directly as a creditor against the grantee, in order to avoid circuitry of action, and save the mortgagor, as an intermediate party, from being harassed for the payment of the debt, and then driven to

¹ Bull v. Titworth, 29 N. J. Eq. 73.

² Crawford v. Edwards, *supra*, per Marston, J.

³ Halsey v. Reed, 9 Paige (N. Y.), 446; Curtis v. Tyler, 9 Ib. 432; King v. White-ly, 10 Ib. 465; Marsh v. Pike, 10 Ib. 595, 597; Cornell v. Prescott, 2 Barb. (N. Y.) 16; Russell v. Pistor, 7 N. Y. 171; Trotter v. Hughes, 12 N. Y. 74.

In Douglass v. Wells, 18 Hun (N. Y.), 88, 95, Boeckes, J., says: "It is somewhat perplexing to determine precisely the ground on which the rule now established in our own state is made to rest, whether on the ground that the assuming of the

mortgage debt by the grantee creates a privity of contract between him and the mortgagee, or makes the latter privy to the consideration of the promise, or that the right of action in the mortgagee springs simply from the promise of the grantee made to the grantor for the mortgagee's benefit. Whatever may be the ground of the ruling, it is now firmly and definitely settled in the courts of this state that the promise of the grantee, in a case like this under consideration, may be adopted and enforced by the mortgagee as a personal obligation of the former to the latter."

seek relief over against his grantee, upon whom the liability would ultimately fall.¹

To support an action upon this ground, therefore, it is necessary in the first place that the grantor, in whose favor the stipulation is made, should himself be personally liable for the debt assumed by the grantee; and in the second place, that there be a debt or some obligation, on the part of the person assuming the payment of the mortgage, to support his undertaking. If the grantor be not the mortgagor himself, or one who has bound himself personally for the payment of the mortgage debt, the grantee, in assuming the payment of the mortgage, does not become personally liable through the grantor to the holder of the mortgage to pay the debt to him.² There is in such case no chance for any equitable subrogation, and the agreement is considered as a mere declaration that the property was conveyed to the purchaser subject to the lien of the mortgage.³

Under this view a mortgagee's right under a purchaser's agreement to assume the mortgage is an equitable right, and can be enforced only by equitable suit.⁴ Where foreclosure is effected by suit in equity, this right is usually enforced by making the purchaser a party to the bill, and asking for a personal decree for deficiency against him.⁵

The mortgagee generally enforces this liability of the purchaser by making him a party to the foreclosure suit as provided by statute.⁶

756. Accordingly when such an agreement to assume the payment of a mortgage is contained in a mortgage, it does not as a general rule impose any personal liability upon the mortgagee for the payment of the prior mortgage debt, which can be enforced against him by the prior mortgagee.⁷ The subsequent

¹ *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, — substantially the language of *Depue, J.*

² *Wise v. Fuller*, 29 N. J. Eq. 257; *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital of St. Barnabas*, *Id.* 650; *Moore's Appeal*, 88 Pa. St. 450; *S. C. 7 Reporter*, 538; *Mount v. Van Ness*, 33 N. J. Eq. 262; *Norwood v. De Hart*, 30 N. J. Eq. 412.

³ § 760; *King v. Whitely*, 10 Paige (N. Y.), 465; *Trotter v. Hughes*, 12 N. Y. 74. See *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; § 579.

⁴ § 762.

⁵ *Bull v. Titsworth*, 29 N. J. Eq. 73; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Rogers v. Herron*, 92 Ill. 583.

⁶ *Johnson v. Harder*, 45 Iowa, 677; *Ream v. Jack*, 44 Iowa, 325; *Ross v. Kenison*, 38 Iowa, 396; *Schmucker v. Sibert*, 18 Kans. 104; *Anthony v. Herman*, 14 Kans. 494; *Miller v. Thompson*, 34 Mich. 10.

⁷ *Garnsey v. Rogers*, 47 N. Y. 233.

mortgagee owes no money for the land which he can promise to pay to the prior mortgagee, for he does not acquire title to the land. Where one "buys the land absolutely for a stipulated price, and instead of paying the whole of it to his grantor he is allowed to retain a part, which he agrees to pay to a creditor of a grantor having a lien upon the land, the amount which he thus agrees to pay is his own debt, which, by arrangement with his grantor, he has agreed to pay to the creditor of the latter, and, although this arrangement, not being assented to by the creditor, does not discharge the grantee from liability, yet, as between him and the party who has assumed it, the grantor is a mere surety. If the grantee pays it, he pays only what he agreed to pay for the land, and pays it in the manner agreed upon. And there is no hardship in allowing either the grantor or the mortgagee to enforce its payment. But in the case of a party having the land merely as security, such an undertaking is simply a promise to advance money to pay the debt of his grantor or mortgagor, which money, when advanced, the junior mortgagee can collect under his mortgage."¹

In like manner a prior mortgagee, who has received from the mortgagor a release of the equity of redemption subject to a second mortgage, not in payment of his mortgage but as additional security, is not liable to pay the second mortgage debt, although his deed recites that it is made in consideration of his mortgage and the balance due on the second mortgage. He may show by parol what was the real consideration.²

757. The fact, that the assumption of the prior mortgage is made in an absolute deed intended as a mortgage, does not change this rule.³ The title of the grantee is defeasible. The grantor reserves the right to annul it by paying the debt, and when he does so, he discharges the agreement to pay the prior mortgage. "The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for, if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for

¹ Mr. Justice Rapallo, in *Garnsey v. Rogers*, 47 N. Y. 233.

² *Huebsch v. Scheel*, 81 Ill. 281.

³ *Garnsey v. Rogers*, *supra*; *Arnaud v. Grigg*, 29 N. J. Eq. 482; *Gaffney v.*

Hicks, 131 Mass. 124. The case of *Ricard v. Sanderson*, 41 N. Y. 179, may perhaps be distinguished in some particulars; but if not must yield to the later decision of *Garnsey v. Rogers*, *supra*.

his benefit only, and prevents its enuring to the benefit of any third party.”¹

Moreover, in such case the grantee receives no money with which to pay a prior mortgage debt, nor any conveyance of the entire estate upon a consideration of which the amount of the prior mortgage debt formed a part. He receives merely a mortgage title, defeasible upon the payment of a debt, or the performance of some other obligation. Upon the performance of the condition he is obliged to release or reconvey the property to grantor. He is to reconvey merely the title or interest conveyed to him. He received nothing from his grantor which is a consideration for undertaking to pay a prior mortgage debt; and, therefore, he is under no obligation either to his grantor or to the prior mortgagee to pay such debt.²

But a grantee was held liable to the mortgagee on his covenants to assume and pay the mortgage, where he had taken an absolute conveyance at the request of another and for his benefit, except so far as the profits of the land were to be security for a debt owed him by the person for whom he took the conveyance. The deed in this case was executed with the name of the grantee left blank. The purchaser, by agreement with one to whom he was indebted, inserted his debtor's name as grantee in the deed, with the understanding that the profits should be applied on account of the debt. In a suit against the grantee for a deficiency after a foreclosure of the mortgage, it was held the grantee was the absolute owner in fee of the premises; that the rights of the parties were to be determined by the facts existing when he consented to take the deed with a covenant to pay the mortgage, and that he was liable upon the covenants.³

¹ Per Rapallo, J., in *Garnsey v. Rogers*, 47 N. Y. 233. The terms of the defeasance enabled the grantor to annul the conveyance on paying simply the debt which he owed to the grantee. On this ground the case is distinguished from the ordinary case in *Pardee v. Treat*, 18 Hun (N. Y.), 298.

² *Gaffney v. Hicks*, 131 Mass. 124.

“Taking the two instruments together as constituting one contract, the terms of the agreement to reconvey control the terms of the deed; not only so far as the deed purports to be an absolute conveyance, but also so far as it purports to im-

pose on the grantee the duty of paying off the prior mortgage. When the grantor redeems this mortgage he must do so according to its terms, and one of them is, that the defendant shall reconvey subject to the prior mortgage. It would be an extraordinary and inequitable construction of the agreement to reconvey, not to require of the grantor upon reconveyance the same assumption of the prior mortgage; and the result would be to make the grantor pay a sum of money, which the grantee would have to pay back when he seeks to redeem.” Per Endicott, J.

³ *Campbell v. Smith*, 8 Hun (N. Y.), 6;

Even if the words "under and subject" to a mortgage could import a promise of payment in any case, they will not create any personal liability on the part of the grantee when he merely took the conveyance to oblige the real purchaser, and is merely a dry trustee for him. The criterion of personal liability for an incumbrance upon property purchased is to be found in the contract or consent of the purchaser to become bound for the debt where it forms a part of the price he is to pay for the incumbered property. But where the property is cast upon a person by act of law, or by the agency of others, who are the beneficiaries, there is no reason for assuming that he intended to bind himself and thereby to add a new security for the payment.¹

758. The broad doctrine, that when one person makes a promise for the benefit of a third person, the latter may maintain an action upon it, has been adopted in several states.² It is not needful that any consideration should pass from such third person, or that he should know of it at the time. It is sufficient that the promise be made upon a valuable consideration passing to the grantee, who assumes the mortgage from his grantor, and the mortgagee, in adopting the act of the latter for his benefit, is brought into privity with the promisor, and may enforce the promise, as if it were made directly to him.³

There is a sufficient consideration for such an agreement of a

71 N. Y. 26; following *Lawrence v. Fox*, 20 N. Y. 268. See *Gaffney v. Hicks*, 124 Mass. 301.

¹ *Girard Life Ins. & Trust Co. v. Stewart*, 86 Pa. St. 89. See *Lennig's Estate*, 52 Pa. St. 135.

² *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178. The latter was an action at law upon the grantee's undertaking, without a foreclosure of the mortgage, and without making the mortgagor a party. Mr. Justice Denio agrees that the previous cases proceed upon the principle that the undertaking of the grantee to pay off the incumbrance is a collateral security acquired by the mortgagor, which enures by an equitable subrogation to the benefit of the mortgagee; but since the case before the court was a suit at law, and the doctrine of equitable subrogation could be invoked only in equity, it became necessary to determine whether the action could be maintained

directly upon the grantee's promise in law; and it was decided that it could be.

Also, *Miller v. Winchell*, 70 N. Y. 437; *Hand v. Kennedy*, 83 N. Y. 149; *S. C. 45 Superior Ct. 385*; *Pike v. Seiter*, 15 Hun (N. Y.), 402; *Ross v. Kennison*, 38 Iowa, 396; *Scott v. Gill*, 19 Iowa, 187; *Thompson v. Bertram*, 14 Iowa, 476; *Mansur v. Bartholomew* (Ind. 1878), 19 Alb. L. J. 52; *Corbett v. Waterman*, 11 Iowa, 86, 87; *Moses v. Dallas Dist. Ct.* 12 Iowa, 139; *Lamb v. Tucker*, 42 Iowa, 118; *Center v. McQuesten*, 24 Kans. 480; *Comstock v. Hitt*, 37 Ill. 542; *Twichell v. Mears* (U. S. C. C. Ill.), 6 Rep. 40; *Fitzgerald v. Barker*, 70 Mo. 685; *Heim v. Vogel*, 69 Mo. 529; *McDowell v. Laer*, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319.

³ *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Lawrence v. Fox*, 20 N. Y. 268; followed by *Campbell v. Smith*, 8 Hun (N. Y.), 6.

grantee where his grantor has purchased the property in his own name, and after making a mortgage for a portion of the purchase money has conveyed an undivided portion to the grantee by a deed which recited that the grantee was jointly interested in the premises, the title having for convenience been taken in the name of the grantor, and that the grantee assumed and agreed to pay his proportion of the mortgage. The grantee could not have obtained a conveyance of his interest in the property without either paying or agreeing to pay his portion of the mortgage. Therefore the mortgagee can enforce the mortgage against him to the amount of the portion so assumed.¹

In order to recover upon this theory, it is essential that the plaintiff shall have some relation to or interest in the lands at the time the promise was made. One who acquires an interest in the lands after the making of such promise cannot claim that it was made for his benefit.² A mere stranger cannot intervene, and claim by action the benefit of a contract between the parties to the deed. To entitle a third person to claim the benefit of the agreement of the parties, there must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement.³

The agreement of the purchaser enures in equity to the mortgagee's benefit, and in a court of equity the purchaser is liable directly to him. The grantor becomes the surety of the purchaser, and might file a bill against him and the mortgagee to compel the purchaser to pay the debt directly to the mortgagee, or at least so much of it as might be left after exhausting the mortgaged premises. The purchaser owes the money, and common honesty requires that he should pay it directly to the creditor. When the parties are all before a court of equity, instead of sending the money from the purchaser who owes it to his grantor, and perhaps through several successive grantors back to the mortgagor and from him to the mortgagee, the last purchaser

¹ *Hand v. Kennedy*, 83 N. Y. 149, 150; S. C. 45 Superior Ct. 385.

² *Miller v. Winchell*, 70 N. Y. 437.

³ *Vrooman v. Turner*, 69 N. Y. 280; *Cashman v. Henry*, 75 N. Y. 103; S. C. 19 Alb. L. J. 29; 55 How. (N. Y.) Pr. 234.

The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Per Allen, J., in *Vrooman v. Turner*, *supra*.

who has assumed the mortgage will be required to pay it directly to the person ultimately entitled to receive it.¹

A subsequent assignee of the mortgage has the same right of action against purchasers who have assumed the mortgage that the mortgagee himself had.²

759. Under this rule the mortgagee need not resort to a foreclosure suit in the first instance, but may sue the grantee personally on his undertaking to pay the debt; and he may do this even when the mortgage bond provides that recourse shall first be had to the land, and then only to the obligor for the deficiency.³

In the case of *Thorp v. Keokuk Coal Co.*, the bonds accompanying the mortgage contained a condition that, in case of default, recourse must first be had to the lands mortgaged, and that the obligors would only be answerable for the deficiency.⁴ The mortgage had not been foreclosed, and of course the obligors were not liable before foreclosure; but it was decided that the grantee, having made the agreement for a sufficient consideration passing from his grantor, was liable upon that to the mortgagee absolutely, and not upon the condition contained in the bonds that resort should first be had to the land by foreclosure of the mortgage. "It matters not," said Mr. Commissioner Earl, "that the mortgagor was not liable to pay personally until after foreclosure, and that he was then liable only for the deficiency. It would have made no difference if he had not been liable at all, the defendant having promised, upon a sufficient consideration, to pay the debt. This suit is not primarily upon the bond and mortgage, but upon the promise of the defendant to pay it; and this promise binds the defendant to pay the mortgage debt as it falls due, according to the terms of the bond and mortgage. It was not a conditional or contingent promise, and could not be discharged by payment only of a portion of the debt."

760. Under this rule it is still necessary that the grantor should be personally liable upon the mortgage which his grantee has assumed the payment of, in order to render the grantee liable

¹ Bissell v. Bugbee (U. S. C. C. Dist. of Ind. March, 1879), 8 Cent. L. J. 272.

² Smith v. Ostermeyer, 68 Ind. 432.

³ Thorp v. Keokuk Coal Co. 48 N. Y. 253; S. C. 47 Barb. 439. See King v. Whitely, 10 Paige, 465; S. C. Hoff. Ch. 477.

⁴ 48 N. Y. 253. The clause in the deed was: "This conveyance being made subject to a certain mortgage, &c., the payment of which said mortgage, &c., is hereby assumed by the party of the second part hereto."

upon his covenant to the holder of the mortgage assumed; thus such a covenant made by one to whom the premises are conveyed, after several conveyances have intervened since the conveyance by the mortgagor, cannot be enforced by the holder of the mortgage, unless the grantor in whose deed the payment was assumed had himself assumed the payment of the mortgage debt, or made himself personally liable for it in some way.¹ Therefore a grantee who has assumed to pay a mortgage as part of the consideration of his purchase is not liable for a deficiency arising upon a foreclosure and sale, in case his grantor was not personally liable, legally or equitably, for the payment of it. "Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest; but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who, by bringing his action, adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having received money or other thing for the third party, is not material. In either case there must be a legal right founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit."²

But in Pennsylvania it is held that the purchaser is liable upon his assumption of a mortgage, although the agreement to assume

¹ *Vrooman v. Turner*, 69 N. Y. 280, reversing S. C. 8 Hun (N. Y.), 78. The decision in *Real Est. Trust Co. v. Balch*, 45 N. Y. Superior Ct. 528, was made upon the authority of the decision of *Vrooman v. Turner*, in the Supreme Court, and is therefore erroneous. And see *Johnson v. Harder*, 45 Iowa, 677.

² Per Allen, J., in *Vrooman v. Turner*, 69 N. Y. 280, 285. Collating and comparing other similar cases supporting the doctrine of *Lawrence v. Fox*, the learned Judge says: "In *Burr v. Beers*, and *Thorp v. Keokuk Coal Co.*, the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the principle of *Lawrence v. Fox*, *Halsey v. Reed*, and *Curtis v. Tyler*, *supra*. See, also, per Bosworth, J., *Doolittle v. Naylor*, 2 Bosw. 206, 225, and *Ford v. David*,

1 Bosw. 569. It is claimed that *King v. Whitely* and the cases following it were overruled by *Lawrence v. Fox*. But it is very clear that it was not the intention to overrule them, and that the cases are not inconsistent. The doctrine of *Lawrence v. Fox*, although questioned and criticised, was not first adopted in this state by the decision of that case. It was expressly adjudged as early as 1825, in *Farley v. Cleveland*, 4 Cow. 432, affirmed in the court for the correction of errors in 1827, *per totam curiam*, and reported in 9 Cow. 639. The Chancellor was not ignorant of these decisions when he decided *King v. Whitely*, nor was Judge Denio and his associates unaware of them when *Trotter v. Hughes* was decided; and Judge Gray, in *Lawrence v. Fox*, says the case of *Farley v. Cleveland* had never been doubted."

be in a deed from a grantor who was under no personal liability to pay the mortgage. The purchaser's agreement cannot be said to be without consideration, inasmuch as the price of the land is the consideration. "A vendor may direct how the purchase money shall be paid. He may reserve it to himself, donate it to a public charity, or may make such other disposition of it as may best meet his views; and if his vendee agrees to pay it according to such directions, he cannot set up as a defence that his vendor was under no duty to apply it in such manner."¹

761. The promise must be express. — The doctrine that a promise by one person made to another for the benefit of a third may be enforced by the latter, although he was not privy to the transaction, must be limited, it would seem, to cases in which the promise is *expressly* stated to be for his benefit, or in which he has received money or property out of which to pay the obligation assumed; for it has been held that an agreement by one partner with another to pay the debts of the firm cannot be enforced by a firm creditor; because the agreement was not for their benefit, but to exonerate the partner from his liability.²

761 a. That the mortgagee may directly enforce a purchaser's agreement to pay the mortgage is really a doctrine in equity and not at law. In several states, including those in which the broad doctrine above stated is declared, under their codes of procedure, the plaintiff in any action is entitled to whatever relief either law or equity would have afforded him on the case presented, before the distinction between them in practice was abolished.³ The two systems are blended together; and either legal or equitable rights are enforced as occasion may demand. In such states when the holder of the mortgage is allowed to enforce a purchaser's agreement of assumption, the remedy is really given upon the equity side of the court.⁴

While it is true that there are some decisions to the effect that a mortgagee may directly enforce a purchaser's agreement with the mortgagor to pay the mortgage debt, yet the general rule remains unchanged that at law a promise by a third person to pay the debt of another cannot be enforced directly by the creditor. The promise is primarily for the benefit of the original debtor, and to relieve him from liability for it; there being no novation, he has a right of action against the promisor for his own indemnity;

¹ *Merriman v. Moore*, 90 Pa. St. 78, 81.

² § 1818.

³ *Merrill v. Green*, 55 N. Y. 270.

⁴ *Miller v. Billingsly*, 41 Ind. 489.

and he alone has such right of action. If the original creditor can sue also, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. This rule was affirmed in a late case before the Supreme Court of the United States.¹ Mr. Justice Strong, delivering the opinion of the court, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third." There are other exceptions to the rule that privity of contract is necessary; but such a case as that here considered does not come within any of them. The original creditor cannot sue at law upon an undertaking of a third person to pay an existing debt.²

¹ Second Nat. Bank v. Grand Lodge, 98 U. S. 123; S. C. 8 Cent. L. J. 71. Also, to like effect, Bissell v. Bugbee (U. S. C. C. Dist. Ind.), 8 Cent. L. J. 272, per Gresham, J.; United States Mortgage Co. v. Hill (C. C. D. Mass. 1879); Mellen v. Whipple, 1 Gray (Mass.), 317; Exchange Bank v. Rice, 107 Mass. 37; Prentice v. Brimhall, 123 Mass. 291; Locke v. Homer, 131 Mass. 93; Coffin v. Adams, 131 Mass. 133; Gautzert v. Hoge, 73 Ill. 30.

² The same question was before the Supreme Court in Massachusetts, in Mellen v. Whipple, 1 Gray, 317, where it was held that no action at law by the mortgagee lies upon the promise of a purchaser to assume and pay the mortgage. Mr. Justice Metcalf said: "The counsel for the plaintiff, in his brief, puts the case upon this ground: 'On a promise not under seal, made by A. to B., for a good consid-

eration, to pay B.'s debt to C., C. may sue A.'" Lord Holt, in *Yard v. Eland*, 1 Ld. Raym. 368, and Buller, J., in *Marchington v. Vernon*, 1 Bos. and Pul. 101, note, used nearly the same language; and it has been transferred into various text-books, as if it were a general rule of law. But it is no more true, as a general rule, than another maxim, often found in the books, to wit, that a moral obligation is a sufficient consideration to support an express promise. Both maxims require great modification; because each expresses rather an exception to a general rule than the rule itself. . . . That general rule is and always has been that a plaintiff, in an action on a simple contract, must be the person from whom the consideration of the contract actually moved, and that a stranger to the consideration cannot sue on the contract. The rule is sometimes

In a recent case in New Jersey¹ the ordinary chancery doctrine, that the covenant of a purchaser who assumes the payment of an existing mortgage is a collateral security obtained by the mortgagor, which enures by way of equitable subrogation to the benefit of the mortgagee, is asserted. It is declared that the mortgagee's right does not rest on the theory of a contract between him and the purchaser; that no action at law can be maintained to assert this right; but that the remedy is purely equitable.²

thus expressed: There must be a privity of contract between the plaintiff and defendant, in order to render the defendant liable to an action by the plaintiff on the contract." The learned judge then examines three classes of cases which are exceptions to this rule; but the case under consideration did not come in either class.

The same rule is recognized in the recent cases of *Pettee v. Peppard*, 120 Mass. 522; *Exchange Bank v. Rice*, 107 Mass. 37, 41; *Prentice v. Brimhall*, 123 Mass. 291; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

It is a general principle that when one person, for a valuable consideration, engages with another by *simple contract* to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement. It does not rest upon the ground of any actual or supposed relationship between the parties, or upon any implied agency, but upon the broad basis that the law, operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation, on which the action is founded. Per Bigelow, J., in *Brewer v. Dyer*, 7 Cush. (Mass.) 337; and see *Carnegie v. Morrison*, 2 Met. (Mass.) 381, per Shaw, C. J.; *Bohanan v. Pope*, 42 Me. 93; *Motley v. Manuf. Ins. Co.* 29 Met. 337.

¹ *Crowell v. Currier*, 27 N. J. Eq. 152; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650.

² *Klapworth v. Dressler*, 13 N. J. Eq. 62.

Referring to the case of *Burr v. Beers*, 24 N. Y. 178, where it was held that a mortgagee may maintain an action at

law, before foreclosure, on such covenant, upon the broad principle that a promise by one person to another, for the benefit of a third, may be enforced directly by the latter, Vice Chancellor Van Fleet said: "This principle, in its application to simple contracts, has given rise to a great contrariety of judicial opinion. So far as it applies to simple contracts, it must be regarded as settled in this state for the present. *Joslin v. N. J. Car Spring Co.* 36 N. J. L. 146. But it has never been understood to apply to contracts under seal. And *Burr v. Beers* is, so far as I know, the first attempt in that direction. The rule that an action at law for breach of a contract under seal can only be brought in the name of a party to the instrument, and that a third person, who is not a party to it, cannot sue on it, though it appears to have been made expressly for his advantage, is so ancient, and has been so generally adhered to, that it must be regarded as axiomatic, and beyond the power of the courts to alter or destroy. 1 *Chitty on Contr.* (11th Am. ed.) 77; *Johnson v. Foster*, 12 Met. (Mass.) 167; *Mellen v. Whipple*, 1 Gray (Mass.), 317; *Millard v. Baldwin*, 3 Gray (Mass.), 484, 486. The legal nature of contracts of assumption, when expressed in deeds, is no longer open to dispute in this state. They have been declared to be valid covenants, for breach of which an action of covenant may be maintained. *Finley v. Simpson*, 22 N. J. L. 311. So completely is the assumption of the purchaser regarded as a contract with the grantor alone, that unless the grantor is personally liable for the mortgage debt, the promise of the purchaser is held to be a *nudum pactum*, and of

In Michigan also it is held that the mortgagee cannot enforce a promise to pay the mortgage, made to the mortgagor by the latter's grantee, because the promise is not made to the mortgagee, but to a third person ; but nevertheless the purchaser who has promised to pay the mortgage may be joined as a party defendant in an equitable suit to foreclose the mortgage, and a decree may be obtained against him for any deficiency that may exist after the land is sold. But this is only by way of enforcing an equity by subrogation.¹

761 b. The mortgagee has no right without the consent of the mortgagor to maintain an action in his name upon the agreement of a grantee of the mortgagor in a deed poll to assume and pay the mortgage debt.² It has already been noticed that an action at law upon such an agreement can be brought only in the name of the mortgagor. The agreement is with him, and a third person can obtain the exclusive right to the control of an action at law only where he has acquired the whole interest of the nominal plaintiff, either by his voluntary act or by operation of law. But in the case of a transaction such as is now under consideration the " mortgagee has not acquired the entire interest of the grantor in the promise of the grantee to the grantor, or in the right of action under that promise. The grantor has a direct interest in that promise, because, if it is broken by the neglect of the grantee to pay the mortgage debt at maturity, the grantor has an immediate right, without any notice to or in-

course without efficacy in favor of either grantor or mortgagee. *King v. Whitely*, 10 Paige, 465 ; *Trotter v. Hughes*, 12 N. Y. 74. It would seem to be clear, then, that in ordinary cases the mortgagee does not, by force of the contract, acquire a right of action against the purchaser, but the benefit flowing to him from the contract is limited to a right to be subrogated to the rights of his debtor. He stands in his debtor's rights, and may appropriate, to the satisfaction of his mortgage, any security held by his debtor, for its payment ; he can, therefore, only have a personal judgment against the purchaser for his debt, when the mortgagor holds an obligation which will support such judgment. His right is simply the right of substitution, permitting a new creditor to take the place of

an old one, and allowing the new to succeed to the rights of the old one. The adoption of the other view would lead to the establishment of this anomalous and unjust principle, that a person shall have a right of action on a contract to which he is not a party, but a stranger ; which was not made for his benefit, for which he gave no consideration, and which never influenced his conduct in the slightest degree." See § 760 ; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600, 611 ; *Mount v. Van Neas*, 33 N. J. Eq. 262, 265.

¹ *Booth v. Conn. Mut. Life Ins. Co.* 43 Mich. 299 ; *Higman v. Stewart*, 38 Mich. 513 ; *Hicks v. McGarry*, 38 Mich. 667 ; *Unger v. Smith*, 44 Mich. 22 ; *Stuart v. Worden*, 42 Mich. 154.

² *Coffin v. Adams*, 131 Mass. 133.

terposition of the mortgagee, to sue the grantee at law upon his promise, and to recover the amount of the mortgage debt remaining unpaid. He has a direct interest in the action, in the amount to be recovered, and in the control of the litigation, because he is himself liable to pay the mortgage debt to the mortgagee; and if the amount recovered by judgment, and collected on execution, in this action shall be less than the amount of the mortgage debt, and the amount so collected shall be paid to the mortgagee, he will still remain liable to the latter for the rest of the mortgage debt."¹ It was accordingly held that a mortgagor who has without consideration consented that the mortgagee might bring an action at law in his name against one who had assumed in a deed poll to pay the mortgage, might withdraw his consent, and have the action dismissed on payment of costs to the mortgagee to the time of such withdrawal.

762. Contrary to the general rule a mortgagee has been allowed to recover in a suit at law against the purchaser, upon the ground that the transaction amounts to a novation.² Thus, in a recent case in Rhode Island, it was held that the purchaser by assuming the mortgage was substituted as the debtor to the mortgagee, in lieu of the mortgagor, and that the mortgagee completed the novation when he assented to it by bringing suit upon the undertaking; and consequently that he could recover of the purchaser in an action of assumpsit. The promise of the purchaser was regarded as made to the mortgagee through the medium of the mortgagor or grantor, acting as the mortgagee's agent, so that, when he was informed of it, he could ratify and adopt it; and he was regarded as having ratified it by

¹ *Coffin v. Adams*, *supra*, per Gray, C. J. In regard to the remedy by suit in equity Chief Justice Gray, in this case, remarked: "There are indeed authorities which sustain the right of the mortgagee, upon a bill in equity for foreclosure to which the mortgagor and his grantee are both made parties defendant, to obtain the benefit of the liability of the latter on his promise to the grantor. But the ground upon which those cases proceed is that in equity the mortgagee, as against his mortgagor, has the right to the benefit of any collateral security held by the latter for the payment of his debt to the mortgagee; and that a court of equity, having the mortgagee, the mortgagor, and the grantee be-

fore it, can adjust in one suit all the rights of the parties. However that may be, they give no countenance to the theory that the mortgagee has the exclusive right, in law or equity, without bringing a suit for foreclosure, to maintain an action at law against the grantee in the name of the mortgagor without his consent, or that a court of law, when both the mortgagor and the mortgagee are interested in the cause of action, can, upon summary motion and without regular issues, determine the equities between them, and take the control of the action out of the hands of the plaintiff of record."

² See §§ 758-761.

bringing suit as effectually as if he had stood by at the time of the transaction and assented to it.¹

By a recent statute in Connecticut it is provided that whenever any real estate incumbered by mortgage or lien shall be hereafter conveyed, subject to such mortgage or lien, and in such conveyance there shall be a provision that the grantee shall assume and pay such incumbrance, the holder of such mortgage or lien may, upon the non-payment of the same, maintain an action in his own name upon such promise without obtaining an assignment thereof from the grantor of said premises.²

In Pennsylvania, also, a mortgagee may recover in assumpsit against a purchaser who has assumed the payment of the mortgage.³ His right to recover does not depend upon privity of contract, but upon the rudimental principle that one may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself.⁴

763. Whether the grantor can deprive the mortgagee of the benefit of a covenant made by the grantee who has assumed the payment of the mortgage will in large measure depend upon the ground upon which the mortgagee is allowed to take advantage of such covenant. On the one hand, if this covenant be regarded as an agreement of indemnity against the mortgage

¹ *Urquhart v. Brayton*, 12 R. I. 169. Chief Justice Durfee, delivering the opinion of the court, said: "This is equivalent to regarding the transaction as a novation, or, if not, we think it may be so regarded. The case stands thus: B. is indebted to A.; B. sells land to C., who agrees, instead of paying the price in full, to assume the debt, or to become A.'s debtor in lieu of B. If A. were present, assenting, the novation would be consummated on the instant; but A., being absent, learns of the agreement afterward, and assents to it by bringing his action. Why may we not hold the novation consummated by the assent so given as effectually as if given on the instant? If it be said that in order to create a priority between A. and C. the assent must be mutual, the answer is that C. had already assented, and there was nothing wanting but A.'s assent to perfect the novation. To reach such a conclusion it is only necessary to make certain presumptions, which are so appropriate to the nature of the transaction

that the law can readily allow them. We think the action is maintainable, and that the plaintiff is entitled to recover of the defendant the amount remaining due on the mortgage note."

Potter, J., concurring, said: "It seems to me, while concurring in the result, that it is not necessary to resort to the doctrine of novation in order to sustain the plaintiff's suit. The authorities cited by the plaintiff's counsel amply sustain his right to recover. It is the simple case of one man's placing money in the hands of another for the use of a third person, and to be paid to him. It is a provision for the benefit of the third person, and which he may enforce. And in this case the deed contains the condition, and the purchaser, by acceptance, promises the seller that he will make the payment."

² Acts 1881, c. 97.

³ *Merriman v. Moore*, 90 Pa. St. 78.

⁴ *Hoff's App.* 24 Pa. St. 200; *Townsend v. Long*, 77 Pa. St. 143; *Justice v. Tallman*, 86 Pa. St. 147.

debt, which the mortgagee may avail himself of by way of equitable subrogation, the grantor and his purchaser may at any time before the filing of a bill to foreclose the mortgage extinguish the liability, as between themselves, by a reconveyance of the property; and as the contract of indemnity is thus put an end to by the act of the parties to it, there is then no right to which the mortgagee can be subrogated. "The mortgagee being the representative of and standing in the place of the mortgagor, to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled to such remedy only as the mortgagor himself had against the purchaser when the bill is filed. In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who were parties to it to rescind and extinguish it at their pleasure; and after such rescission and extinguishment the contract becomes utterly incapable of enforcement."¹

A grantee who has assumed the payment of a mortgage, terminates his liability to the holder of the mortgage by a reconveyance of the premises made in good faith to his grantor, who in turn assumes the mortgage.²

Even a voluntary release made by the grantor without consideration, in anticipation of the filing of a bill for foreclosure, and for the express purpose of releasing the grantee from liability for a deficiency, will not for that reason be invalid; though it would be otherwise if the grantor has become insolvent, and the effect of the release would be to hinder or defraud creditors by depriving them of the means which the debtor had in his hands for the payment of debts.³ "A party who has incurred responsibility for the payment of a mortgage debt, either as a mortgagor or by a subsequent assumption of liability, and has conveyed the mortgaged premises, taking a covenant from his grantee for the payment of the mortgage debt, would have no more right, in

¹ *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650, per Depue, J.; followed *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290, Depue, J., saying: "Where a collateral obligation is given, or a trust is created, merely for the indemnity of the surety, and for his protection and benefit only, it may be released and discharged by him as the only person interested in it, and his release, as a general

rule, will operate as a complete extinguishment, unless, in the mean time, some equitable right in it has arisen in favor of a third person."

² *Laing v. Byrne*, 34 N. J. Eq. 52.

³ *Youngs v. Trustees of Public Schools*, 31 N. J. Eq. 290; *Trustees for Support of Public Schools v. Anderson*, 30 N. J. Eq. 366.

case of his insolvency, to divest himself, by a voluntary release of the covenant of indemnity against his liability for the mortgage debt, to the prejudice of the grantor creditor, than he would have to surrender, without consideration, a covenant against incumbrances or a promissory note, or to give up property or rights of any other description which might be made available in satisfaction of debts. But this disability of one to do with his own as he pleases arises only on the happening of insolvency, and when creditors are thereby hindered or deprived of the means of collecting their demands."¹

But in states where the covenant of the purchaser to assume an existing mortgage is regarded as a promise for the benefit of the mortgagee, the promise has been regarded as irrevocable.² There is a dictum to this effect in *Garnsey v. Rogers*,³ in which case the Court of Appeals of New York distinguished between a covenant by a grantee in an absolute deed to assume a mortgage, and one made by a subsequent mortgagee to assume a prior mortgage, holding that the latter does not thereby make himself personally liable for such debt to the prior mortgagee. Mr. Justice Rapallo, in stating the grounds of this distinction, said: "It must be considered that, where such an assumption is made on an absolute conveyance of land, it is unconditional and irrevocable. The grantor cannot retract his conveyance, or the grantee his promise or undertaking; but, where contained in a mortgage, the conveyance is defeasible. The grantor reserves the right to annul it by paying his debt, and when he does so he discharges the agreement to pay the prior mortgage. The reservation of this right is inconsistent with the idea that the assumption by the grantee was for the benefit of the prior mortgagee; for if it were, the grantor would have no control over the rights thus acquired by a third party. The reservation of this control by the grantor shows that the agreement was for his benefit only, and prevents its enuring to the benefit of any third party."⁴ It has been suggested in some cases that this statement is subject to the qualification, that the assumption of the mortgage becomes irrevocable as to the mortgagee only after he has knowledge of the agree-

¹ *Ib.* Per Depue, J., in *Youngs v. Trustees of Public Schools*, *supra*.

² *Douglass v. Wells*, 18 Hun (N. Y.), 88, where the subject is fully examined;

Hartley v. Harrison, 24 N. Y. 170; *Campbell v. Smith*, 71 N. Y. 26.

³ 47 N. Y. 233, 242.

⁴ See, also, a dictum to the same effect in *Hartley v. Harrison*, 24 N. Y. 170.

ment, and has by his acquiescence and acceptance made himself a party to it.¹

This doctrine is supported by the decision in *Simson v. Brown*,² in the Supreme Court of New York. That was an action upon a bond given to a mortgagor conditioned to pay to the holder of a mortgage the full amount of it, and to save the mortgagor harmless therefrom, and the payment was guaranteed by another person. The mortgagor was not personally liable for the payment of the mortgage debt, although the principal in the bond was so liable to the holder of the mortgage. The mortgagor who took the bond afterwards executed and delivered to the principal obligor in the bond a satisfaction of the bond, which, however, he did not deliver up or cancel, but afterwards assigned to the holder of the mortgage. In a suit by the latter against the guarantor of the bond, it was held that he was entitled to recover; that the mortgagor did not by his release discharge the bond as against the holder of the mortgage.

It may be remarked of this case, that the bond was in form an obligation to pay the debt to the holder of the mortgage, and to indemnify the mortgagor as well. The mortgagor not being liable for the debt, his release did not harm him, and was a satisfaction of his interest in the obligation; but the principal obligor was directly responsible to the holder of the mortgage aside from the bond, and the bond was to pay the debt. The holder of the mortgage was interested in compelling payment of the bond, and not having himself released the parties bound by it, he had a right to maintain his action unimpaired by the act of the mortgagor.

764. The result of the latest cases upon this subject in New York is, that where the conveyance is absolute to the grantee his assumption of an existing mortgage creates against him an absolute obligation for its payment, and that a release of this obligation cannot be made by the grantor without the assent of the mortgagee. The acceptance on the part of the mortgagee of the benefit of the assumption is a legal presumption, in the absence of proof, of his actual dissent.³

The personal liability of the grantee to the holder of the mort-

¹ *Whiting v. Gearty*, 14 Hun (N. Y.), 498; *Kelly v. Roberts*, 40 N. Y. 432; *Durham v. Bischof*, 47 Ind. 211; *Gilbert v. Sanderson* (Iowa), 1881, 9 N. W. Rep. 293.

² 6 Hun (N. Y.), 251.

³ *Douglass v. Wells*, 18 Hun (N. Y.), 88, where the cases are cited. *Stephens v. Casbacker*, 8 Hun, 116, is overruled.

gage depends, of course, upon the nature of the dealing in which the assumption is made, and is subject to any condition or defeasance attached to such assumption.¹ It may be qualified or controlled not only as between the parties, but also as to the mortgagee, by a contemporaneous agreement of the parties executed on a separate paper.² Moreover, if the consideration for the assumption wholly or in part fails, or there is a good defence to it as between the parties, it would seem that the mortgagee could have no fixed right to enforce the grantee's liability; and that a release of the grantee by the grantor, in accordance with or to the extent of the equities between them, would be binding upon the mortgagee.³

But after the mortgagee has adopted or accepted the agreement of the purchaser for his benefit, he is brought into privity with him, becomes a party to the agreement, is entitled to insist upon the performance of it, and cannot afterwards be deprived of his right of action by any act of the mortgagor in releasing or discharging the purchaser.⁴ It is accordingly held that the mortgagor cannot release the purchaser from his agreement to assume the mortgage after the mortgagee has brought an action to foreclose it, and has asked for a judgment against the purchaser for a deficiency.⁵ Neither can the grantor release the grantee from his obligation incurred by assuming a mortgage, as against a purchaser of the mortgage who may have relied upon the contract of assumption as it appears of record.⁶

765. Conveyance on condition that the grantee pay a mortgage.—A conveyance "subject to" certain mortgages, "to be assumed and paid by the grantee, his heirs, and assigns, the same making part of the consideration," and "on condition" that the grantor and his representatives shall be forever indemnified and saved harmless from the payment of them, is a grant on condition, and forfeited by a breach thereof, and is not in the nature of a mortgage from the grantee to the grantor, with a right of redemption for three years after such breach. Such condition is not extinguished by the grantor's taking back a mortgage for a part of the consideration subject to the mortgages assumed, with covenants to save the grantor harmless against them, and his

¹ *Garnsey v. Rogers*, 47 N. Y. 233;
² *Judson v. Dada*, 79 N. Y. 373.

³ *Flagg v. Munger*, 9 N. Y. 483.

⁴ *Judson v. Dada*, *supra*.

⁵ *Bassett v. Hughes*, 43 Wis. 319.

⁶ *Whiting v. Gearty*, 14 Hun (N. Y.), 498; and see *Durham v. Bischof*, 47 Ind. 211.

⁷ *Hayden v. Drury* (C. C. Ill. 1880), 3 Fed. Rep. 782, 789.

entry upon the land for breach of the condition of the deed is not affected by an assignment of the mortgage before or after such entry.¹ But any entry in such case made for the purpose of foreclosure will not serve as an entry for foreclosure under the condition in the deed until some further notice be given or act done for that purpose.²

In such case if the grantee fail to perform the condition, the grantor is not confined to a forfeiture as his only remedy, but he may maintain an action against the grantee upon his implied promise to pay the mortgage, and recover any payments he has made. The grantor may enter for breach of the condition, but he may have an action upon the promise as well.³

766. Grantor's agreement to discharge a mortgage. — Where a grantor of land, subject to a second mortgage, gives the purchaser a bond conditioned to save him harmless from it, and to cause it to be assigned to him within six months, a failure to do this entitles the purchaser, even after the foreclosure of the first mortgage, to recover damages to the amount of the difference between the value of the estate and the amount due on the first mortgage, if the value of the property is less than the amount of the two mortgages.⁴ But if a grantor, upon the sale of a small portion of premises covered by a mortgage, covenants to pay the mortgage when due, and the rest of the land is worth more than the amount of the debt, and is in equity first liable for it, the grantee, upon a failure to pay the mortgage when due, and before the mortgage is foreclosed, can recover upon such covenant only nominal damages.⁵ If the grantor has covenanted to pay off a mortgage, he cannot, by allowing the mortgage to be foreclosed, and then redeeming it, take and hold title in himself as against his grantee.⁶

The general covenants in a grantor's deed bind him to discharge an existing mortgage, unless there be some provision to the contrary. In equity this covenant may be released without a technical release, by matters *in pais*; as, for instance, by a subsequent transaction between the parties in which the purchaser agrees to assume and pay this mortgage.⁷

767. When a purchaser is entitled to a release. — A pur-

¹ Hancock v. Carlton, 6 Gray (Mass.),

⁵ Wilcox v. Musche, 39 Mich. 101.

39.

⁶ Huxley v. Rice, 40 Mich. 73.

² Stone v. Ellis, 9 Cush. (Mass.) 95.

⁷ Drury v. Tremont Improvement Co

³ Pike v. Brown, 7 Cush. (Mass.) 133.

¹³ Allen (Mass.), 168.

⁴ Coombs v. Jenkins, 16 Gray (Mass.),

chaser of a portion of the premises covered by a mortgage duly recorded is not entitled to a release of that portion by reason that he has given to the mortgagor his promissory note for the whole value of that portion, and the mortgagor has transferred the note to the mortgage creditor to be applied in reduction of the mortgage debt. Neither does the payment of such note give him this right, unless the holder of the mortgage has agreed to release.¹ The mortgage covers the whole property, and secures the whole debt; and the holder of it, aside from any agreement, is under no obligation to release any part of the property upon payment of a part of the debt.

768. The remedy of the grantor. — If a purchaser who has assumed a mortgage debt omit to pay it when due, the seller may take an assignment of the mortgage to himself, foreclose the same, and sue for the deficiency, or sue on the agreement and recover the amount paid by him in obtaining the mortgage, not exceeding the amount unpaid on such mortgage.² In such an action, written receipts indorsed on the mortgage by the mortgagee are competent evidence to show payments thereon. The plaintiff in such action can only recover the amount paid by him.³

After the premises have been sold to one who has agreed to pay off the mortgage, the mortgagor may himself purchase the mortgage and foreclose it.⁴

And so a mortgagor, who has sold subject to the mortgage debt, upon being compelled to pay it, is subrogated to the benefit of the security, without any formal assignment of it to him. He thereby becomes an equitable assignee of it, and may enforce it against the property.⁵

If the grantor die before any right of action accrues upon the grantee's covenant to assume the mortgage, the land descends to the heirs, who are the parties injured by a breach of the covenant, and are the proper parties to sue for a breach of it. The executor or administrator cannot, in such case, maintain the action.⁶

¹ Colby v. Cato, 47 Ala. 247.

² Furnas v. Dargin, 119 Mass. 500; Braman v. Dowse, 12 Cush. (Mass.) 227; Jewett v. Draper, 6 Allen (Mass.), 434; Strohaner v. Voltz, 42 Mich. 444; Bolles v. Beach, 22 N. J. L. 680; Crowell v. Hospital of St. Barnabas, 27 N. J. Eq. 650, 655.

³ Mills v. Watson, 1 Sweeny (N. Y.), 374.

⁴ Mills v. Watson, *supra*.

⁵ Kinnear v. Lowell, 34 Me. 299; Baker v. Terrell, 8 Minn. 195; Ayers v. Dixon, 78 N. Y. 318; Risk v. Hoffman, 69 Ind. 137.

⁶ Ayers v. Dixon, *supra*.

The purchaser, by assuming the payment of the mortgage, makes himself personally liable both to the mortgagee and to the mortgagor. The mortgagor upon paying the mortgage debt may recover the amount paid from such purchaser¹ in an action at law, as for money paid for the grantee's use.² Moreover, on a default the mortgagor may immediately, before paying the mortgage, proceed against him upon his covenant.³ He cannot compel the mortgagee to foreclose his mortgage so as to subject the land to the payment of the debt, and the purchaser to a judgment for the deficiency; but he may himself proceed in equity to compel the purchaser to pay off the mortgage according to his undertaking.⁴ Under codes of practice allowing an equitable suit in such case, the grantor may maintain a bill to have the mortgage satisfied out of the land.⁵

When land is conveyed to several grantees in different proportions definitely specified, subject to a mortgage which they agree to assume and pay, they are jointly liable for a breach of this agreement.⁶

If the deed in which a grantee assumes the payment of a mortgage be executed by a husband and wife as grantors, the promise implied by law from the acceptance of the deed is to both, and an action for breach of the promise should be brought in the name of both, although the wife alone signed the mortgage note, and the husband joined "to give validity" thereto. But if in an action by the wife alone the merits of the case have been fully tried, she will be allowed to amend after verdict in her favor, by joining her husband, taking no costs since the trial.⁷

769. A contract to pay a mortgage may be enforced before the promisee has paid it. A provision whereby a grantee "assumes and agrees to pay" a mortgage is a contract not merely to indemnify the grantor, but to pay the debt, provided it be the debt of the grantor. It is not necessary, therefore, as it is in case of an agreement purely to indemnify the grantor against any loss

¹ Wood v. Smith, 51 Iowa, 156.

² Lappen v. Gill, 129 Mass. 349. In such action, evidence is inadmissible that, at the time the mortgage was made, the grantor held the land in trust for the grantee and others, and the mortgage was given to take up the defendant's share of a previous mortgage.

³ Rubens v. Prindle, 44 Barb. (N. Y.) 336; Bowen v. Kurtz, 37 Iowa, 239.

⁴ Marsh v. Pike, 1 Sandf. (N. Y.) Ch. 210; S. C. 10 Paige, 595; Cornell v. Prescott, 2 Barb. (N. Y.) 16; Marshall v. Davies, 78 N. Y. 414 (N. Y. Ct. Appeals). See, however, Slauson v. Watkins, 25 Alb. L. J. 72.

⁵ Abell v. Coons, 7 Cal. 105.

⁶ Fenton v. Lord, 128 Mass. 466.

⁷ Fenton v. Lord, *supra*.

or damage by reason of the mortgage,¹ that the grantor should show that he has been in some measure damnified before he can recover on such promise.² "There is no reason," says Mr. Justice Devens, in a recent case before the Supreme Court of Massachusetts, "why an agreement may not be made which shall bind the party so contracting to pay the debt which another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him so to do. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed to pay. It is a portion of the consideration money due the plaintiff, which he was to receive by payment of a debt for which he was liable, which he thus recovers, when the defendant fails to perform his

¹ Little v. Little, 13 Pick. (Mass.) 426.

² Furnas v. Durgin, 119 Mass. 500; Brewer v. Worthington, 10 Allen (Mass.), 329. See Gaffney v. Hicks, 124 Mass. 301; Gregory v. Hartley, 6 Neb. 356; Wilson v. Stilwell, 9 Ohio St. 467; Stout v. Folger, 34 Iowa, 71; Snyder v. Summers, 1 Lea (Tenn.), 534, 540; Cilley v. Fenton, 130 Mass. 323; Foster v. Atwater, 42 Conn. 244; Locke v. Homer, 131 Mass. 93, where the whole subject and the cases are elaborately examined by Gray, C. J., who, upon the point under consideration, said: "The only differences between Furnas v. Durgin, *supra*, and the case at bar are that in the present case it is not in terms stipulated that the defendant shall 'pay' as well as 'assume' the mortgage; and that it is stipulated that he shall 'hold the grantors harmless from' the same. These differences do not affect the result. Under such circumstances, in common understanding and in legal effect, to 'assume' a debt is an undertaking to pay it as the proper debt of the party who enters into the undertaking. *Braman v. Dowse*, 12 Cush. (Mass.) 227; *Drury v. Tremont Improvement Co.* 13 Allen (Mass.), 168, 171; *United States Mortgage Co. v. Hill* (C. C. D. Mass. 1879);

Stout v. Folger, 34 Iowa, 71. And it is well settled, as appears by the cases already referred to, that when the defendant promises to pay a certain debt due from the plaintiff to a third person, the effect of this promise is not restricted, either as to the form of pleading, the rules of evidence, or the measure of damages, by the fact that the defendant by his agreement further promises to indemnify the plaintiff and save him harmless." Citing, *Hodgson v. Bell*, 7 T. R. 93; *Holmes v. Rhodes*, 1 B. & P. 638; *Penny v. Foy*, 8 B. & C. 11; S. C. 2 Man. & R. 181; *Robinson v. Robinson*, 24 Law Times Reports, 112; *Lathrop v. Atwood*, 21 Conn. 117; *Gage v. Lewis*, 68 Ill. 604; *Carr v. Roberts*, 2 Nev. & M. 42; S. C. 5 B. & Ad. 78; *Hodgson v. Wood*, 2 H. & C. 649; *Thomas v. Allen*, 1 Hill (N. Y.), 145; *Churchill v. Hunt*, 3 Denio (N. Y.), 321; *Belloni v. Freeborn*, 63 N. Y. 383; *Stout v. Folger*, 34 Iowa, 71. See, also, to same effect, *Wicker v. Hoppock*, 6 Wall. 94; *Loosemore v. Radford*, 9 M. & W. 657; *Smith v. Pond*, 11 Gray (Mass.), 234; *Farnsworth v. Boardman*, 131 Mass. 115; *Reed v. Paul*, 131 Mass. 129.

Contra, see *Burbank v. Gould*, 15 Me. 118.

promise. That the plaintiff should be kept subject to a debt from which the defendant agreed to relieve him is a continuing injury, for which a sum of money, which will enable him to discharge it, is an appropriate remedy in damages."¹

Such a promise when no time is specified for the payment of the mortgage, is a promise to pay it when it becomes due, or, if it be already due to pay it forthwith.²

Payment of the debt by the grantee to the mortgagee would discharge the debt and the mortgage given to secure it. If he make such payment at the day fixed, there is no breach of his promise to the grantor. If he make it afterwards at any time before final judgment against him in an action by his grantor upon that promise, only nominal damages could be recovered of him.³

Moreover, if the grantee does not pay *ad diem*, and so breaks his agreement, the fact that he may also be in danger of having the mortgage enforced against his land affords no defence to the action at law by the grantor against him upon his agreement. If he has equities, by reason of his failure to pay having been caused by accident, mistake, or fraud, or any other matter against which a court of equity will grant relief, his remedy must be sought in equity; as, for instance, by bill against the mortgagee and the grantor, on which the mortgagee may be ordered to accept payment of the mortgage debt, with proper interest, expenses, and costs, and the grantor, upon such payment being made by the grantee, may be restrained from prosecuting his action at law against the latter, except for nominal damages.⁴

But when the suit by the grantor to enforce his grantee's agreement to assume and pay a mortgage is in equity and not at law, payment of the amount of the mortgage debt will not be enforced against the purchaser until the grantor has paid the mort-

¹ *Furnas v. Durgin*, 119 Mass. 500. See authorities there cited in support of the proposition that a promise to pay a debt due from the promisee, even where it has not been paid by him, is one upon which an action may be maintained and damages recovered to the amount of such debt.

The decision in *Furnas v. Durgin*, *supra*, has been recognized in *Valentine v. Wheeler*, 122 Mass. 566, 568; *Fiske v. Tolman*, 124 Mass. 254, 256; *Gaffney v.*

Hicks, 124 Mass. 301, 304; and expressly followed and reaffirmed, after a careful reëxamination of the whole subject, in *Locke v. Homer*, 131 Mass. 93.

² *Furnas v. Durgin*, *supra*.

³ *Locke v. Homer*, 131 Mass. 93, per Gray, C. J.; *Furnas v. Durgin*, 119 Mass. 500, 508, per Devens, J.; *Hood v. Adams*, 124 Mass. 481; *Muhlig v. Fiske*, 131 Mass. 110.

⁴ *Locke v. Homer*, *supra*, per Gray, C. J.

gage, or, if a decree is made without such payment, it will be that so much as is necessary to pay the mortgage be retained and paid directly to the mortgagee.¹

A mortgage conditioned to pay the mortgagor's earlier mortgage upon lands conveyed by him to the mortgagee, and save him harmless therefrom, cannot be foreclosed until the mortgagee has paid the earlier mortgage, at least if the mortgagee in the earlier mortgage is not made a party to the suit.²

770. The measure of damages in an action by the grantor against his grantee upon his promise to pay a mortgage debt is the amount of the debt and interest remaining due.³ If the grantor has paid the mortgage debt before bringing suit against the grantee upon his promise, the measure of damages is the amount so paid.⁴ If the defendant should pay the debt after suit at any time before final judgment, the damages to be recovered would be nominal only.⁵ Such payment would obviate the risk that otherwise may be incurred, that the plaintiff may not devote the sum recovered by him to the payment of the mortgage debt, and that the defendant, in order to relieve his property, may be compelled to pay the amount a second time.⁶

In a suit by a grantor against his grantee, who had assumed the payment of a mortgage upon the premises, it appeared that the grantor, at an attempted sale under the mortgage, bid a certain sum, much less than the amount of the mortgage, at which the land was struck off to him, though he failed to complete the purchase, and thereupon a verdict was entered for the difference between the amount of the mortgage and the amount bid at the

¹ *Waters v. Bassel*, 58 Miss. 602; citing, but not following, *Furnas v. Durgin*, *supra*, for reason stated. See, also, *Ayers v. Dixon*, 78 N. Y. 318.

This distinction is moreover recognized in *Furnas v. Durgin*, for it is there said:

"There is no mode at law by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract. Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded that would secure the party paying under such circumstances from having the payment made by him devoted to any other object than that which would relieve him or his estate from further responsibility. However this may be, the want of elasticity in

the forms of the common law, which does not enable us to make such a decree here as would guard the rights of all parties, should not prevent us from giving to the plaintiff the benefit of the contract which he has made, or compel him to remain subject to the burden of the debt which the defendant has agreed to extinguish."

² *Learned v. Bishop*, 42 Wis. 470; *Waters v. Bassel*, *supra*.

³ *Locke v. Homer*, 131 Mass. 93.

⁴ *Town v. Wood*, 37 Ill. 512.

⁵ *Elmer v. Welch*, 47 Conn. 56, 59, per *Pardee, J.*; *Hall v. Way*, 47 Conn. 467, 473, per *Carpenter, J.*

⁶ *Furnas v. Durgin*, 119 Mass. 500, 508.

sale, but no judgment was entered. Subsequently the land was sold and conveyed by the mortgagee to another person for a less sum than that bid by the grantor. The grantee thereupon brought a bill in equity to restrain the grantor from obtaining and enforcing judgment, and to have the amount paid for the property upon the final sale of it under the mortgage credited upon the verdict. The bill was dismissed, upon the ground that the grantee had once received the benefit of the value of the land in part payment of the debt which he had assumed, and had no interest in the proceeds of the sale.¹

¹ *Cilley v. Fenton*, 130 Mass. 323.

CHAPTER XVIII.

A LESSEE'S RIGHTS AND LIABILITIES, 771-785.

771. The mortgagor while allowed to remain in possession without an entry by the mortgagee, although there has been a breach of the condition of the mortgage, is entitled to receive the rents and profits to his own use, and is not liable to account for them to the mortgagee.¹ If the premises are under lease, the right of the mortgagor in possession to the rents is the same, whether the lease was made before or after the mortgage; he may lawfully receive the rents until the mortgagee interferes; and may receive them to his own use, and not to the use of the mortgagee.²

In those states in which the mortgagee is prohibited from taking possession previous to foreclosure, the mortgagor may make a valid and binding assignment of the rents and profits until foreclosure and sale. Such an assignment does not operate as a fraud upon the mortgagee, because he is not in any event entitled to the rents and profits before such time. The assignee of the rents and profits may enforce his right to them by an action in the nature of a foreclosure suit.³ In the absence of a specific pledge of the rents and profits to the mortgagee as part of his security, the mortgagor, though insolvent, may, until the foreclosure sale, or until the appointment of a receiver pending the foreclosure suit, receive them to his own use or assign them to another.⁴ The foreclosure sale alone does not divest the mortgagor of his right of possession; he may occupy the premises or receive the rents of them until the delivery of the deed to the purchaser. A lessee having purchased at the foreclosure sale, and a delay of several weeks having occurred in the delivery of the deed to him, during

¹ *Fitchburg Cotton Manuf. Corp. v. Melven*, 15 Mass. 268; *Gibson v. Farley*, 16 Mass. 280; *Boston Bank v. Reed*, 8 Pick. (Mass.) 459; *Wilder v. Houghton*, 1 Ib. 87, 89; *Mayo v. Fletcher*, 14 Ib. 525; *M'Kircher v. Hawley*, 16 Johns. (N. Y.) 289; *Clarke v. Curtis*, 1 Gratt. (Va.) 289; *Noyes v. Rich*, 52 Me. 115; *Long v. Wade*, 70 Me. 358.

² *Trent v. Hunt*, 9 Exch. 14, 22, per *Alderson, B.* See § 670.

³ *Dewey v. Latson*, 6 Cal. 609.

⁴ *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201. See § 669.

which a quarter's rent became due under the lease, he was held liable in an action by the mortgagor for such rent. Although he made a tender of the purchase money soon after the sale, it was held that his tender did not operate to vest in him the legal title; nor did the subsequent delivery of the deed to him operate by relation to vest the title in him at the time of the purchase, or of the tender of the purchase money. He should have followed up his tender by a motion to pay the money into court, or to compel the completion of the sale, whereupon the court could have adjusted the equities of all the parties, and made the loss arising from the delay fall upon the party whose negligence caused it. The court might have ordered the tenant to attorn to the purchaser, and the interest on the mortgage to cease from the day of tender.¹

772. A mortgagee has no specific lien upon the rents and profits of the mortgaged land unless he has in the mortgage stipulated for a specific pledge of them as part of his security. He has no claim upon them until he has the right to take possession of the premises under his mortgage. Until the mortgage debt is due he is not entitled to have a receiver of such rents appointed.² The tenant may safely continue to pay rent to the mortgagor, until he receives notice from the mortgagee of his requirement that the rents be paid to him.

Where a mortgagee has taken a lease of the mortgaged premises from the mortgagor, upon a subsequent sale of the equity of redemption, he cannot apply the rents as against the purchaser in set-off upon the mortgage debt.³

773. A lease already existing at the date of the mortgage is in no way invalidated by the giving of the mortgage. It is then a paramount interest, and the mortgage is subject to it. The mortgagee has only the rights of the mortgagor as against the lessee.⁴

The mortgagor may of course, at the time of making a mortgage of the reversion, release the tenant from the payment of the rents accrued at that time; but otherwise the rent then accruing goes with the reversion, and the mortgagee is entitled to it if he gives the tenant notice before the rent day.⁵

¹ *Clason v. Corley*, 5 Sandf. (N. Y.) 447.

² *Bank of Ogdensburgh v. Arnold*, 5 Paige (N. Y.), 38.

³ *Scott v. Fritz*, 51 Pa. St. 418; *Taliaferro v. Gay*, 78 Ky. 496.

⁴ *Hemphill v. Giles*, 66 N. C. 512.

⁵ *De Nicholls v. Saunders*, L. R. 5 C. P. 589.

But a payment of rents in advance is not binding upon a mortgagee of the reversion. "The question is," says Mr. Justice Willes,¹ "whether, where there has been an assignment of a reversion, payment of rent to the assignor before rent day takes away the rights of the assignee to the rent so completely, that if he should give notice before rent day of the assignment, the payment would still be good. There would be an obvious injustice in that, even if the payment were made before the assignment, because a person who bought the reversion, on the faith that the rent was becoming due, would be defeated by a transaction between the landlord and tenant, of which he had no notice."

774. A mortgage of premises already leased is an assignment of the reversion. It is an established rule that a mortgagee upon giving notice to a tenant of the mortgaged premises, under a lease for years given prior to the mortgage, is entitled to all rent accruing and becoming due subsequent to the execution of the mortgage, as well that in arrear at the time of giving notice as that which accrues afterwards. This was decided in the time of Lord Mansfield, and has been a recognized principle ever since.² The mortgagee becomes entitled to the rent without any attornment by the tenant. The mere execution of the mortgage subsequent to the lease operates as an assignment of the reversion, and carries the rent as incident to it, and the mortgagee is entitled, upon notice to the tenant, to receive the rents whenever he is entitled to possession. No actual entry by him is necessary.

Rent accrued prior to the mortgage does not pass as incident to the reversion, but is a mere chose in action belonging to the mortgagor.³ But rent accruing and becoming due after the execution of the mortgage does pass as incident to the reversion, and may be recovered of the lessee after notice of the mortgage, and without an actual entry by the mortgagee upon the premises. His right does not extend to rents already due when the mort-

¹ *De Nicholls v. Saunders*, *supra*; and see *Cook v. Guerra*, 7 *Ib.* 132.

² *Rogers v. Humphreys*, 4 *Ad. & E.* 299; *Trent v. Hunt*, 9 *Exch.* 14; *Moss v. Gallimore*, *Doug.* 279; 4 *Kent Com.* 165; 1 *Smith's Lead Cas.* 810; *Newall v. Wright*, 3 *Mass.* 138; *Fitchburg Cotton*

Manuf. Corp. v. Melven, 15 *Mass.* 268; *Burden v. Thayer*, 3 *Met. (Mass.)* 76, 79; *Russell v. Allen*, 2 *Allen (Mass.)*, 42; *Mirick v. Hoppin*, 118 *Mass.* 582; *Kimball v. Lockwood*, 6 *R. I.* 138; *King v. Housatonic R. R. Co.*, 45 *Conn.* 226.

³ *King v. Housatonic R. R. Co. supra.*

gage was executed, or to rents which have been paid to the mortgagor before notice to the lessee of the mortgage.¹

The mortgagee as assignee of the reversion has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had, so long as the term continues, and the tenant acknowledges his title.²

775. To entitle the mortgagee to the rents as against the mortgagor, it is not necessary that his entry should be effectual for the purpose of foreclosure, but any possession taken by him with notice to the tenants to pay the rent to him is sufficient.³ The mortgagor cannot recover for rents that accrue afterwards. To an action by him on the covenants of the lease, the entry of the mortgagee and the promise of the lessee to pay him are a good defence. Where the mortgagor has appointed an agent to receive the rents of the mortgaged estate, a notice to him by the mortgagee to pay the rents when collected to himself is a termination of the mortgagor's tenancy at will, and the agent will hold the rents subsequently accruing as trustee of the mortgagee.⁴ If the tenant, after receiving notice from a mortgagee entitled to possession that he claims the rents, pays them to the mortgagor, he is not absolved from the legal obligation to pay the same to the mortgagee.⁵

776. A mortgagor cannot make a lease of the mortgaged premises which will be binding upon the mortgagee.⁶ Upon a breach of the condition the mortgagee may enter, and treat the lessee as a trespasser, and without notice bring ejectment.⁷ If the mortgagee after entry accepts rent from such lessee, the relation of landlord and tenant is thereby created, but this tenancy will be deemed one from year to year, and not for the term of the original lease.⁸ The mortgagee can no longer treat the lessee as a trespasser.⁹

Whether the tenant has actual notice of the mortgage or not makes no difference if the mortgage be recorded; it is then constructive notice, and affects one who becomes the tenant of the

¹ *Russell v. Allen*, 2 Allen (Mass.), 42; *Mirick v. Hoppin*, 118 Mass. 582.

² *Rogers v. Humphreys*, 4 Ad. & El. 299, 313, per Lord Denman, C. J.; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23.

³ *Stone v. Patterson*, 19 Pick. (Mass.) 476; *Welch v. Adams*, 1 Met. (Mass.) 494.

⁴ *Crosby v. Harlow*, 21 Me. 499.

⁵ *Watford v. Oates*, 57 Ala. 290.

⁶ *McDermott v. Burke*, 16 Cal. 580; *Russum v. Wanser*, 53 Md. 92.

⁷ *Thunder v. Belcher*, 3 East, 449; *Rogers v. Humphreys*, 4 Ad. & El. 299, per Lord Denman.

⁸ *Hughes v. Bucknell*, 8 Car. & P. 566.

⁹ *Birch v. Wright*, 1 T. R. 378.

mortgagor as much as it affects a purchaser. The mortgagor has no implied power to bind the mortgagee by lease.¹

A mortgagor's lease is, however, good as between the parties, by virtue of the contract, and upon a subsequent discharge of the mortgage the defect in the lessee's title is removed. But the tenant cannot compel the mortgagor to pay off the mortgage in order that his lease may be perfected; but he is left to his remedy at law for damages.² It is avoided only upon the interference of the mortgagee, and until that time the mortgagor is entitled to receive the rent to his own use, and to enforce the payment of it by action in his own name.³

777. Lease made after the mortgage. — The rights and liabilities of the parties are very different when a mortgagor in possession makes a lease for years subsequent to the execution of the mortgage. There is then no privity of contract between the mortgagee and lessee, and until actual entry by the mortgagee, or the lessee expressly promises to pay rent to him, he can maintain no action against the lessee to recover it.⁴ He cannot by mere notice compel the tenant to pay rent to him, and his title to rent does not accrue until he has obtained possession of the mortgaged estate; but if the tenants of the mortgagor pay rent to the mortgagee, they thereby by attornment become his tenants, and entitle him from that time to receive the rents.⁵

The mortgagee may treat a lessee holding under a lease from the mortgagor as a trespasser, and eject him; but unless the tenant has attorned to him, he cannot distrain or bring an action for rent, as there is no relation of landlord and tenant between them.⁶ A mere notice by the mortgagee to the tenant to pay the rent to him, to which the tenant does not consent, or upon which he does not act, does not make the tenant liable to him in an action for rent, nor does a request by the mortgagor that he will pay to the mortgagee have this effect.⁷

¹ *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

² *Costigan v. Hastler*, 2 Sch. & Lef. 160. See *Howe v. Hunt*, 31 Beav. 420; *Carpenter v. Parker*, 3 C. B. N. S. 206.

³ *Trent v. Hunt*, 9 Exch. 14, 22, per Alderson, B.

⁴ *Morse v. Goddard*, 13 Met. (Mass.) 177; *Field v. Swan*, 10 Ib. 112; *Mass. Hosp. Life Ins. Co. v. Wilson*, 10 Ib. 126; *White v. Wear*, 4 Mo. App. 341; *Noyes*

v. Rich, 52 Me. 115; *Long v. Wade*, 70 Me. 358.

⁵ *Kimball v. Lockwood*, 6 R. I. 138.

⁶ *Rogers v. Humphreys*, 4 Ad. & El. 299, 313, per Lord Denman, C. J.

⁷ *Evans v. Elliot*, 9 Ad. & El. 342.

In *Alabama* it is provided that every conveyance of an estate is good and effectual without attornment of the tenant; but that no tenant is liable who has paid his rent without notice of such conveyance. Code, 1867, § 1568.

If the tenants under such a lease attorn to the mortgagee after a breach of the condition which gives him the right of entry, they thereby become his tenants and debar the mortgagor from recovering from them.¹ The mortgagee, as between him and the mortgagor, has then the right to enter and take possession of the premises; and if the tenant yields up possession to the mortgagee, he does voluntarily what the law will compel him to do. By attornment he does not injure the mortgagor, and he saves himself the costs of an eviction by the mortgagee. His attornment is a good defence to an action by the mortgagor for the rent,² or to an action to recover possession of the property by a summary proceeding.³ The tenant in such case does not dispute the title of his landlord, but justifies his possession under it.

It is no answer to a claim for rent by a second mortgagee who has entered that there is a prior mortgage, under which no entry has been made.⁴

Until the tenant has attorned to the mortgagee, he is liable to the lessor for rent, though the latter be insolvent, and the mortgagee threatens foreclosure.⁵

778. But in a state where a mortgage is regarded as conveying no title to the mortgagee, and the right of possession until foreclosure and sale is assured to the mortgagor by statute, it has been held that there is nothing to rest an attornment upon, and that this doctrine has no application. The verbal agreement of the tenant to pay rent to the mortgagee does not continue the existing tenancy, simply putting the mortgagee

The mortgagee is entitled to the rents upon giving notice to the tenant. *Marx v. Marx*, 51 Ala. 222; *Knox v. Easton*, 38 Ala. 345; *Hutchinson v. Dearing*, 20 Ala. 798; *Mansony v. U. S. Bank*, 4 Ala. 735; *Coker v. Pearsall*, 6 Ala. 542; *Branch Bank at Mobile v. Fry*, 23 Ala. 770.

¹ *Kimball v. Lockwood*, 6 R. I. 138; *Hemphill v. Giles*, 66 N. C. 512; and see *Doe v. Barton*, 11 Ad. & El. 307, 315.

² *Adams v. Bigelow*, 128 Mass. 365; *Cook v. Johnson*, 121 Mass. 326; *Knowles v. Maynard*, 13 Met. (Mass.) 352; *Smith v. Shepard*, 15 Pick. (Mass.) 147; *Magill v. Hinsdale*, 6 Conn. 464; *Jones v. Clark*, 20 Johns. (N. Y.) 51; *Jackson v. De Lancey*, 11 Ib. 365. See *Souders v. Vansickle*, 8 N. J. L. (3 Halst.) 313, 315.

In Iowa it is provided by statute that the attornment of a tenant to a stranger is void, unless made to a mortgagee after the mortgage has been forfeited. It is also provided the mortgagor may redeem within one year after a foreclosure sale, and that he is in the mean time entitled to possession. Under these provisions the construction is that there can be no valid attornment of a tenant to a mortgagee until the expiration of the mortgagor's right of redemption. *Mills v. Heaton*, 52 Iowa, 215; *Mills v. Hamilton*, 49 Iowa, 105.

³ *Breitenbucher v. McElroy* (N. J. 1879), 2 N. J. Law J. 157.

⁴ *Cavis v. McClary*, 5 N. H. 529.

⁵ *McDowell v. Hendrix*, 67 Ind. 513.

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in place of the mortgagor as landlord; but it is a new undertaking, and must be valid as a new agreement if valid at all.¹

779. Tenants cannot be allowed compensation for improvements, although they have taken leases for a term of years, with a certain rent, and have made advancements of money to the mortgagor under an agreement that he should expend it in buildings and improvements, and he so spends it.²

If the mortgagor, or his tenants, or others claiming under him, make improvements, they can avail themselves of their improvements by paying the mortgage debt.

If, during the pendency of an action to foreclose a mortgage, the mortgagor makes leases under which the lessees enter and retain actual possession under claim of right, the mortgagee, after recovering judgment for possession against them, is entitled to recover damages for rents and profits from the time when the formal possession was delivered to him; and not merely for the rents and profits of the land, but also for the rents and profits of buildings erected and improvements made on the premises by the tenants, although they had reason to believe that their title under the lease was valid.³

780. Emblements.—A mortgagor is subject to ejectment without notice whenever the mortgagee has the right to enter, and is not entitled to the growing crops.⁴ His tenant has no greater rights. The mortgagee may treat him as a trespasser, he may enter immediately and take the emblements.

By foreclosure and sale, the purchaser of the premises becomes entitled to the possession of them, and to all the crops then growing on them; and a lessee holding the property under a lease from the mortgagor made subsequently to the mortgage, without the concurrence of the mortgagee, has no greater right than the mortgagor to the emblements.⁵ Under such a lease the lessee

¹ *Hogsett v. Ellis*, 17 Mich. 351. Mr. Justice Christiancy said: "If it be said that, though the mortgage does not give the mortgagee the right to possession against the will of the mortgagor, yet, by the consent of the mortgagor and the tenant, he may be let into possession, and thus acquire the right to rent; so, I reply, may any other person not holding a mortgage acquire in the same way the right to possession and the right to rent, by any valid agreement to that effect. But, in both cases alike, I think it would

depend upon the contract, *as such*, which might be made between them, and not upon the doctrine of attornment."

² *Haven v. Boston & Worcester R. R. Co.* 8 Allen (Mass.), 369.

³ *Haven v. Adams*, 4 Allen (Mass.), 80.

⁴ See §§ 697, 776; *Rankin v. Kinsey*, 7 Bradw. (Ill.) 215.

⁵ See § 697; *Lane v. King*, 8 Wend. (N. Y.) 584; *Downard v. Groff*, 40 Iowa, 597; *Anderson v. Strauss*, 98 Ill. 485.

holds subject to all the rights of the mortgagee, unimpaired and unaffected ; and is liable to trespass for taking and carrying away the crops growing at the time of the sale.

781. No one but the mortgagee can take advantage of the invalidity of a lease as to him. Although a lease made by a mortgagor after the execution of the mortgage is not binding upon the mortgagee, and the lessee holds subject to the rights of the mortgagee, yet if the mortgagee does not object to the lease as interfering with his rights or as impairing the security the mortgage was intended to give, or that there has been any forfeiture of the conditions, a stranger should not be permitted to volunteer such objections, which are strictly technical, in order to avoid liability for an unauthorized trespass. This was the determination of the Supreme Court of Missouri in a case where the lessee under such a lease brought suit for trespass upon the leased premises for the carrying away of a large amount of lead ore. The defendant was not allowed to set up the invalidity of the lease as against the mortgagee.¹

782. Doubtless a provision may be made in a mortgage, which would enable the mortgagor, while remaining in possession, to give leases of the premises which would be binding upon the mortgagee or any one claiming under him after a breach of the condition of the mortgage, and possession taken by him under it. But when the circumstances are such that the power reserved by the mortgagor to make leases is repugnant to the purposes of the mortgage, the exercise of it will not avail to make the leases valid beyond the time of a breach of the condition. Such was held to be the case where a railroad company executed a mortgage to trustees, to secure bonds of the form annexed thereto, which contained a certificate that it was secured by a mortgage of real estate, and the mortgage contained a provision authorizing the trustees upon a breach of the condition, at the request of the bondholder, to take possession of the premises, or under certain circumstances to sell them at public auction ; and the mortgage further provided, that until breach of the condition the mortgagor should remain in undisturbed possession and occupation, "and that nothing herein contained shall be so construed as to prevent said corporation from improving said real estate, or making leases of such parts thereof as they may desire and have opportunity to make."² Leases were made by the corporation

¹ Kennett v. Plummer, 28 Mo. 142.

² Haven v. Adams, 4 Allen (Mass.), 80.

for a long term of years, and the rent was partly paid in advance, and the mortgagees having subsequently foreclosed the mortgage, the tenants claimed that the leases were valid by virtue of this clause. In construing this provision in its application to the leases, and in determining whether they were within the right reserved, the court advert to the purpose for which the mortgage was made, saying that it was not made to secure the mortgagees their private claims, but debts due to bondholders; that the bonds were made to be sold in the market, and were transferable by delivery. The leases provided for the application of the rents to the payment for improvements, and to the payment of interest on bonds of the corporation held by the lessees in a way to create a preference over the bondholders generally. "If the right to create such a preference," say the court, "had been so clearly expressed in the mortgage, and stated in the certificate on the bonds, as that all parties understood it, the bonds must have been regarded as unsound, and would have had little or no market value. And if the parties to the mortgage intended that such a right should be reserved, the certificate must be regarded as fraudulent, and as designed to give the bonds a fictitious credit. It is impossible to state a stronger case of repugnance to the object of a grant." It was therefore decided that the validity of the leases terminated upon breach of the condition of the mortgage, and that the trustees could not, by an oral assent, confirm them so as to give them validity for a longer time.

783. A lease made by the mortgagee in possession is necessarily terminated by a redemption of the mortgage, unless there has been some express or implied authority from the mortgagor to lease for a given time.¹ But it has been held that if all the parties are before a court of chancery, the court will not direct the delivery of possession at a time that would work great hardship to the lessee.² Ordinarily, however, the mortgagor may upon redemption treat the mortgagee's tenant as a trespasser and recover possession without notice, just as a mortgagee may upon entry treat the mortgagor's lessee. The only safety for a lessee in taking a lease of premises subject to a mortgage is to obtain the concurrent action of the mortgagor and mortgagee in the execution of the lease.

A mortgagee having neither the possession nor the right of

¹ *Hungerford v. Clay*, 9 Mod. 1; *Wil-*
lard v. Harvey, 5 N. H. 252.

² *Holt v. Rees*, 46 Ill. 181; S. C. 44
Ill. 30.

possession cannot confer either upon another by a lease ; and in fact he can convey no interest by such lease, save his bare legal title in states where the mortgagee has such title ; though such a lease may be effectual against him by way of estoppel.¹

784. An assignment by a mortgagee in possession does not transfer any rent due at the time of the assignment without express words to that effect ; nor does it pass any right of action the mortgagee had for any appropriation of the products of the land by the mortgagor or any other person.² In *Salmon v. Dean*,³ Lord Chancellor Truro, upon this question, said : " One would think that this was a very ordinary matter : men are in the daily habit of conveying estates, and if the by-gone rents in arrear do not pass by a conveyance of the fee, what is the rule of law that makes a difference in the case of a mortgage ? " In conclusion, he added : " I am unable to understand, having listened attentively to the argument, upon what principle of law or equity the assignee of a mortgage can claim the rent due before the assignment to him, he not pretending that the assignment contains any words of transfer beyond those incidental to the transfer of the mere mortgage."

785. A mortgage of a leasehold estate, being in law an assignment of the lease, makes the mortgagee liable upon the covenants of the lease for the payment of rent, from the time of the mortgage, as this covenant in the lease runs with the land, and binds the party holding the legal estate. It makes no difference whether the mortgagee be in possession or not ; if he is assignee of the entire term, he is liable on the real covenants of the lease.⁴ But where, as in New York, a mortgage is considered as a mere lien, a mortgagee not in possession is not considered as an assignee of the entire term, and therefore it is held that he is not liable for rent until he takes possession.⁵ Where the registry laws of a state require the recording of a mortgage or the assignment of it to make it valid, if not recorded

¹ Union Mut. Life Ins. Co. v. Lovitt, 10 Neb. 301.

² *Salmon v. Dean*, 3 Mac. & G. 344 ; *Kimball v. Lewiston Steam Mill Co.* 55 Me. 494.

³ *Supra*.

⁴ *Williams v. Bosanquet*, 1 Brod. & B. 238, overruling *Eaton v. Jaques*, 2 Doug. 455, where Lord Mansfield held that a mortgagee out of possession was not liable.

See *Calvert v. Bradley*, 16 How. 580 ; *Lester v. Hardesty*, 29 Md. 50 ; *Mayhew v. Hardesty*, 8 Md. 479 ; *Pingrey v. Watkins*, 15 Vt. 479 ; *Farmers' Bank v. Mut. Assurance Soc.* 4 Leigh (Va.), 69.

⁵ *Walton v. Cronly*, 14 Wend. (N. Y.) 63 ; *Astor v. Miller*, 2 Paige (N. Y.), 68 ; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603 ; *Childs v. Clark*, 3 Barb. (N. Y.) Ch. 52.

it is ineffectual to pass the legal estate, and liability upon these covenants is not incurred by the person taking such unrecorded instrument.¹

In making a mortgage of a leasehold estate it is often preferable for the mortgagee to take an assignment of the lease for a period short of the whole term, rather than a formal mortgage of the leasehold estate which amounts to an assignment of the whole term, and makes the mortgagee liable upon the covenants of the lease, although he does not enter into possession of the property. A lease or an assignment of the rents for a period short of the whole term subjects him to no such liability; but on the other hand, it is not so complete a security, especially as it leaves the mortgagor in a position to forfeit and defeat the estate. Therefore in taking security upon a leasehold estate, the mode of effecting it is a matter to be determined according to the circumstances of the case.

If a lessee assign his estate by way of mortgage, the assignee is liable on the covenants of the lease to pay rent, although he does not actually enter and take possession under the mortgage; but he is only liable for the rent which accrues after the taking of the mortgage. The covenants of the lease running with the land, it is regarded as a necessary consequence that the mortgagee, by becoming vested of the whole legal estate, is liable for the performance of the covenants.²

The making of a mortgage of a leasehold estate is a breach of a covenant not to assign, except, perhaps, where a mortgage is regarded as a mere lien, and not a transfer of title.³

The mortgagee of a leasehold estate is entitled, in the absence of any stipulation to the contrary, to all rents that subsequently become due, and may maintain an action against the tenants to recover them; but he has no right to the rents that were due at the time of the grant to him of the reversion.⁴

The mortgagee is entitled to the benefit of any covenants contained in the lease for a renewal of it, and his lien attaches to the renewed lease.⁵

¹ *Lester v. Hardesty*, 29 Md. 50.

² *M'Murphy v. Minot*, 4 N. H. 251.

³ *Riggs v. Fursell*, 66 N. Y. 193.

⁴ *Burden v. Thayer*, 3 Met. (Mass.) 76.

⁵ *Slee v. Manhattan Co.* 1 Paige (N. Y.), 48.

CHAPTER XIX.

ASSIGNMENT OF MORTGAGES.

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| I. A formal assignment, 786-791. | V. Equitable assignments, 813-822. |
| II. Whether an assignment may be compelled, 792, 793. | VI. Construction and effect of assignments, 823-833. |
| III. Who may make an assignment, 794-803. | VII. Whether an assignee takes subject to equities, 834-847. |
| IV. What constitutes an assignment, 804-812. | |

1. *A Formal Assignment.*

786. **Form of assignment.** — An assignment of a mortgage is usually effected by a brief form in which the mortgage is identified by a recital of the names of the parties to it, of its date, and of the book and page in the registry where it is recorded, without any other description of the property. If the reference to the mortgage is so deficient that the register cannot tell by the description what mortgage is intended, and therefore omits to make the usual reference to the assignment on the margin of the record of the mortgage, the assignee may lose all benefit of the record.¹ It is usual to deliver with the assignment the original mortgage; but this is not essential.² It is, however, essential to a formal and complete assignment that the note or bond secured by the mortgage should be indorsed or otherwise assigned, and delivered with the assignment; or, at any rate, that an intention should be manifest to assign the mortgage debt, to which the mortgage is only an incident; otherwise the assignment will only pass a naked legal title to the land.

The deed of assignment sometimes contains a covenant by the assignor that he has good right and lawful authority to sell and convey the mortgage. This is a covenant that the mortgage is an existing lien, as well as lawfully transferred, and it is broken by

¹ *Moore v. Sloan*, 50 Barb. (N. Y.) 442.
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² *Warden v. Adams*, 15 Mass. 233.
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the existence of a previous release of the security, or of any defect in it, which impairs or destroys it as an effective mortgage.¹

787. The legal title to a mortgage can only be transferred by deed,² except in those states where the common law character of the mortgage as an estate in land has given place to the doctrine that the mortgage is a mere chattel interest.

An assignment, though indorsed upon the mortgage and delivered with it, if not under seal, conveys only an equitable interest.³ It does not pass the legal estate, though it will authorize the assignee to enforce the mortgage in equity.⁴ It must also contain the words necessary in an ordinary deed of land to pass the legal estate, as, for instance, words of grant.⁵

An assignment by deed puts the assignee in the place of the mortgagee. It is *ipso facto* a transfer of the premises covered by the mortgage.⁶ It passes the legal estate, and enables the assignee to foreclose in his own name. The mortgagee has no longer any right or interest in, or claim to, the lands mortgaged, and an action in his name in respect to them can be no longer maintained.⁷

If the assignment in terms assigns the mortgage deed and the

¹ Byles v. Lawrence, 35 Mich. 458.

² Warden v. Adams, 15 Mass. 233; Adams v. Parker, 12 Gray (Mass.), 53; Douglass v. Durin, 51 Me. 121; Smith v. Kelley, 27 Me. 237; Dorkray v. Noble, 8 Me. 278; Dwinel v. Perley, 32 Me. 197; Lyford v. Ross, 33 Me. 197; Warren v. Homestead, 33 Me. 256; Givan v. Doe, 7 Blackf. (Ind.) 210; Burton v. Baxter, Ib. 297; Henderson v. Pilgrim, 22 Tex. 464, 478; Torrey v. Deavitt, 53 Vt. 331. Although the language of the assignment creates a trust in the assignee, if it vests in him the legal title he can foreclose it. Phelps v. Townsley, 10 Allen (Mass.), 554.

³ Adams v. Parker, *supra*.

⁴ Kinna v. Smith, 3 N. J. Eq. (2 Green) 14.

⁵ Cottrell v. Adams, 2 Biss. 351. "The proper technical words of an assignment are 'assign, transfer, and set over.' But the words 'give, grant, bargain, and sell,' or any other words, which show the intent of the parties to make a complete transfer, will amount to an assignment." 4 Cruise Dig. 88.

In New Jersey it is provided by statute

that mortgages shall be assignable at law, and that the assignee may sue in his own name. The assignment must be in writing, but need not be under seal. Nixon's Dig. p. 613; Mulford v. Peterson, 35 N. J. L. 127.

In Pennsylvania, also, it is provided that an assignee may maintain *scire facias* or other suit, upon a mortgage and bond in his own name; but the assignment should be a formal one, under seal, and attested by two witnesses. 1 Brightly's Purdon's Dig. p. 485; and see Twitchell v. McMurtrie, 77 Pa. St. 383. Although a formal assignment passes the legal estate, and the assignee may sue in his own name, yet a mortgage is not considered a conveyance of real estate, except in form, while it is in fact only a security for money. McCandless v. Engle, 51 Pa. St. 309.

⁶ Hills v. Eliot, 12 Mass. 26; Wiley v. Williamson, 68 Me. 71.

⁷ Gould v. Newman, 6 Mass. 239. See Reading of Judge Trowbridge, 8 Mass. 554; Pryor v. Wood, 31 Pa. St. 142.

debt thereby secured, it is an assignment of the entire mortgage, and not merely of the mortgagee's interest in it not previously conveyed, although it contains the language, "and all my right, title, and interest in the premises therein described." This language does not operate as it might in a common deed of conveyance to give precedence to prior unrecorded deeds of the same property.¹

The second or third, or any subsequent assignee, taking the mortgage and note before maturity, takes the same estate and the same rights that the first assignee had.²

788. Consideration. — Whether the assignee of a mortgage has paid value for it or not does not concern the mortgagor, except in reference to his interposing an equitable defence in the way of payment or set-off.³ Although the assignee has purchased the mortgage for less than the amount due upon it, it is none the less a valid security for the entire debt.⁴ An assignment to an attorney, for the purpose of enforcing collection of the mortgage debt, is a valid assignment, and passes the legal title with the right to exercise the power of sale given by the mortgage.⁵ But one who buys a note and mortgage which are not delivered to him, making only a nominal payment prior to his receiving notice that they belong to another, is not entitled to protection as a *bond fide* purchaser.⁶

Neither the mortgagor nor a purchaser subject to the mortgage, can redeem except by paying the amount due on the mortgage. If a mortgage be made without consideration for the purpose of being negotiated, the price paid by the assignee becomes the consideration of the mortgage, and makes it a valid security.⁷ The assignee is not, however, bound to see that the money he pays for it is applied to the use of the mortgagor.⁸

When any consideration is necessary to support an assignment, the forbearance of a creditor, and his extension of the time of payment, is sufficient.⁹

¹ Wiley v. Williamson, 68 Me. 71.

² Hoitt v. Webb, 36 N. H. 158.

³ Adair v. Adair, 5 Mich. 204.

⁴ Warner v. Gouverneur, 1 Barb. (N. Y.) 36; Knox v. Galligan, 21 Wis. 470; Pease v. Benson, 28 Me. 336.

⁵ Russum v. Wanser, 53 Md. 92.

⁶ Haescig v. Brown, 34 Mich. 503; and see Dresser v. Mo. & Iowa Ry. Construction Co. 93 U. S. 92; Campbell v. Roach,

45 Ala. 667; Weaver v. Barden, 49 N. Y. 286, 291.

⁷ Croft v. Bunster, 9 Wis. 503; Schafer v. Reilly, 50 N. Y. 61.

⁸ Westervelt v. Scott, 11 N. J. Eq. (3 Stockt.) 80; McCurdy v. Agnew, 8 N. J. Eq. (4 Halst.) 733.

⁹ Worcester Nat. Bank v. Cheeney, 87 Ill. 602.

789. After a mortgagee has been disseised he cannot make a valid assignment. In this respect the general doctrine applies that a disseisee, without an entry and delivery of the deed on the land, cannot convey a title valid as against the disseisor.¹ Ordinarily, however, the possession of the mortgagor is the possession of the mortgagee, and is not adverse; and such possession is therefore no obstacle to an assignment.² Even exclusive possession by the mortgagor, with a claim of exclusive ownership, does not of itself amount to a disseisin of the mortgagee. The possession of the mortgagor being the possession of the mortgagee, it follows that the disseisin of the mortgagor is the disseisin of the mortgagee, and so long as the disseisor is in possession, the mortgagee cannot pass his interest in the land by a deed of assignment.³ From the disseisin of the mortgagor an intent to disseise the mortgagee, who holds under him, follows as a matter of course, unless the disseisor expressly recognizes the mortgagee's title.⁴

A second mortgagee may make a valid assignment of his interest, although he has at the time been ousted from possession by one claiming under a prior mortgage from the same mortgagor.⁵

In New Hampshire it is a settled rule that a conveyance, as distinguished from an assignment, by a mortgagee not in possession, does not pass the debt secured by the mortgage, and does not pass any interest in the land; but a devise of his interest in the mortgaged premises passes the debt secured. The intention of the testator governs the construction of the will.⁶

790. Delivery is, of course, as essential to the validity of an assignment of a mortgage as it is to the validity of the mortgage itself; and therefore if it be executed and acknowledged, and made complete in every other way, if it be not delivered to the assignee it amounts to nothing.⁷ A second assignment to a *bond fide* purchaser after a previous assignment not delivered, though recorded, is entitled to priority.⁸ To constitute a delivery of an

¹ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 385.

² *Murray v. Blackledge*, 71 N. C. 492; *Sheridan v. Welch*, 8 Allen, 166; and see *James v. Morey*, 2 Cow. (N. Y.) 246; *Converse v. Searls*, 10 Vt. 578; *Gould v. Newman*, 6 Mass. 239; *Reading of Judge Trowbridge*, 8 Mass. 554.

³ *Poignard v. Smith*, 8 Pick. (Mass.) 272; S. C. 6 Ib. 172.

⁴ *Dadmun v. Lamson*, 9 Allen (Mass.), 85; *Lincoln v. Emerson*, 108 Mass. 87.

⁵ *Nichols v. Reynolds*, 1 R. I. 30.

⁶ *Clark v. Clark*, 56 N. H. 105, and cases cited. See § 808.

⁷ *Rose v. Kimball*, 16 N. J. Eq. 185; *Ruckman v. Ruckman*, 33 N. J. Eq. 354; *Rankin v. Major*, 9 Iowa, 297.

⁸ *Brown v. Johnston*, 7 Abb. (N. Y.) N. C. 188.

assignment, an intention to pass the property in the debt and mortgage must be shown. A request by the assignor to the assignee to have the assignment recorded as soon as the former should die, when it is shown that the assignee did not have exclusive control of it, but that the assignor collected interest on the mortgage, and otherwise treated it as his own property, and never indorsed or delivered the mortgage note, makes manifest an intention that the assignment should not be operative until the death of the assignor; and consequently it is a nullity as being inconsistent with the statute of wills.¹

791. The assignee of a mortgage, as a practical matter, should always give notice of the assignment to the holder of the equity of redemption, so as to surely protect himself against payments which may be made in good faith to the assignor. The recording of the assignment is not of itself such notice of the assignment as will afford such protection.² If the mortgage secure a bond or other non-negotiable instrument, the fact that the mortgagor, in paying an instalment of the interest or principal, does not require the production of the mortgage bond, for the purpose of having the payment indorsed upon it, does not raise a presumption of bad faith on his part; and under some circumstances no such presumption would arise from his omission to require a delivery up of the securities, upon paying off the whole amount of the mortgage debt;³ though under other circumstances such omission would make him chargeable with knowledge of a prior transfer, and would make the payment ineffectual.⁴ If the assignee of a mortgage fails to give notice of the assignment, and so acts as to authorize the mortgagor to believe that the mortgagee is still the owner of it, he is estopped from denying the right of the mortgagor to deal with the mortgagee as the owner.⁵

¹ *Shurtleff v. Francis*, 118 Mass. 154.

² See § 956; *Reed v. Marble*, 10 Paige (N. Y.), 409, 416; *Van Keuren v. Corkins*, 6 Thomp. & C. (N. Y.) 355; S. C. 4 Hun, 129; 66 N. Y. 77; *James v. Johnson*, 6 Johns. (N. Y.) Ch. 417, 427; *James v. Morey*, 2 Cow. 246; *N. Y. Life Ins. & Trust Co. v. Smith*, 2 Barb. (N. Y.) Ch. 82; *Trustees of Union College v. Wheeler*, 61 N. Y. 88, 111; *Johnson v. Carpenter*, 7 Minn. 176; *Horstman v. Gerker*, 49 Pa. St. 282.

³ *Van Keuren v. Corkins*, *supra*; *Hubbard v. Turner*, 2 McLean, 519.

⁴ §§ 956, 961; *Brown v. Blydenburgh*, 7 N. Y. 141; *Doubleday v. Kress*, 50 N. Y. 410; *Foster v. Beals*, 21 N. Y. 247; *Mitchell v. Cook*, 17 How. (N. Y.) Pr. 110; S. C. 29 Barb. 243; *Burhaus v. Hutcheson*, 25 Kans. 625.

⁵ *McCabe v. Farnsworth*, 27 Mich. 52.

2. *Whether an Assignment may be compelled.*

792. A mortgagee cannot be compelled in equity to assign his mortgage, on receiving payment, in order that subsequent parties in interest may adjust their respective rights. He is entitled to be paid, or to proceed to foreclosure, without being obliged to investigate titles arising after his own. He may release his interest on receiving payment, and leave after claimants to the preferences which their respective titles give them when his mortgage is discharged.¹

A mortgagee is not bound to protect other parties who have interests in the property by assigning his mortgage to any one. His whole duty is performed by releasing his interest on receiving payment. When, therefore, the equity of redemption of a bankrupt had been sold by his assignee, but the bankrupt and his wife having a homestead, and the wife an inchoate right of dower, sought to obtain an assignment of the mortgage so that it might continue as security for the amount paid, it was held that they were not entitled to an assignment, which their bill prayed for, but that the bill might be maintained as a bill to redeem.² Any one having a subsequent incumbrance upon the mortgaged estate can protect his interest, by paying the prior mortgage when it is due, and he thereupon succeeds by subrogation, on settled principles of equity, to the rights and interests of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or transfer by the prior mortgagee. He is not entitled to an assignment.³

The mere fact that one has a right to redeem a mortgage does not enable him to compel an assignment of it to himself. There must be some equitable reason for it, as that the redeeming party is in the position of a surety and is entitled to be subrogated to the position of the holder of the mortgage; or that the mortgagee or the mortgagor, or both of them, were about to do something to injure or destroy the security.⁴ It has been erroneously

¹ *Butler v. Taylor*, 5 Gray (Mass.), 455. See § 1086. Otherwise in *New York*: *Cole v. Malcolm*, 66 N. Y. 363; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553.

² *Lamb v. Montague*, 112 Mass. 352; *Butler v. Taylor*, 5 Gray (Mass.), 455; and see *McCabe v. Bellows*, 7 Gray (Mass.), 148, as to requirement that whole mortgage be redeemed.

³ *Ellsworth v. Lockwood*, 42 N. Y. 89, 96, and cases cited; *Burnet v. Denniston*, 5 Johns. (N. Y.) Ch. 35; *Hubbard v. Ascutney Mill Dam Co.* 20 Vt. 402.

⁴ *Ellsworth v. Lockwood*, 42 N. Y. 89; *Vandercook v. Cohoes Sav. Inst.* 5 Hun (N. Y.), 641.

assumed in some cases that the right to compel an assignment of a prior mortgage and the debt flows from the right of redemption.¹ After a review of the cases upon this point in New York, Sutherland, J., said:² "Upon the whole, I do not think it can be said to be the law of this state, that the right to redeem a mortgage, that is, the right to compel the holder of it to accept or receive payment of it, after it is due and payable, carries with it the right, upon such redemption, to an assignment of the mortgage, and of the bond or other instrument evidencing the mortgage debt, or of either, unless the redeeming party has the position of surety, or can be regarded as surety for the mortgage debt."

793. Sometimes an assignment may be compelled in a court of equity. This has often been done in New York for the protection of a surety, or junior incumbrancer, though not occupying the position of a surety, when in other states he would be protected under the general principles of subrogation.³

For instance, when the mortgagor has conveyed the premises subject to the mortgage, and the holder of the mortgage afterwards attempts to enforce it against him, he is entitled to be subrogated to the position of the holder, who may thereupon be ordered to assign the bond and mortgage to him, or to a third person for his benefit, on receiving the amount due upon it.⁴ "This cannot prejudice the creditor, and it is clearly equitable as between the debtor and the owner of the land. He clearly has no right or color of right, justice, or equity to claim that he, notwithstanding the conveyance of the property subject to the mortgage, and thus entitling him only to its value over and above it, should in fact enjoy and hold it discharged of the incumbrance without any contribution toward its discharge and satisfaction from the land."⁵ It is proper, too, that the assignment should be made to another person for the benefit of the mortgagor.

An assignment in such cases furnishes the only complete protection, for if the mortgagee should cancel the mortgage upon the

¹ *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534, 536; *Jenkins v. Continental Ins. Co.* 12 How. (N. Y.) Pr. 66.

² In *Ellsworth v. Lockwood*, *supra*.

³ § 1087.

⁴ *Johnson v. Zink*, 52 Barb. (N. Y.) 396; S. C. 51 N. Y. 333; *Baker v. Terrell*, 8 Minn. 195. See, also, *Mount v. Suydam*, 4 Sandf. (N. Y.) Ch. 399.

To be entitled to an assignment, one must be the holder of the next lien. *Bishop v. Ogden*, 9 Phila. (Pa.) 524.

For other cases in which an assignment may be compelled in equity, see *Lyon's Appeal*, 61 Pa. St. 15.

⁵ Per Chief Commissioner Lott, on appeal, in *Johnson v. Zink*, *supra*.

record, or release the mortgaged premises upon receiving payment, the owner of the equity of redemption might sell the property to a *bond fide* purchaser, or a creditor of his might attach it or levy an execution upon it.

3. *Who may make an Assignment.*

794. A mortgage made to two persons jointly, to secure a note payable to them jointly, may be assigned by one of them in the name of both; but if it secures separate debts, both must join in an assignment.¹ Where a mortgage note was indorsed to two persons, each was regarded as entitled to one half interest in the note and the proceeds of it, and was held to be incapable of transferring any other or greater interest.² Where a mortgage is made to two or more persons and one of them dies, it would seem that if the mortgage was given to secure a joint debt, the survivor or survivors might assign the mortgage; but if given to secure separate debts or obligations, it is necessary to join the representatives of the deceased mortgagee.³

795. One of several trustees who hold a mortgage cannot make a valid assignment of it. All must join.⁴ On the death of one trustee, the survivors succeed to the rights to which all of them were before jointly entitled. But a mere abandonment or mismanagement of a trust, by one trustee, does not divest his legal interest in the trust property, and transfer it to the other trustees. Such transfer can be made only by deed, or by some legal process.⁵

A legatee to whom a mortgage has been specifically bequeathed, or bequeathed in general as a part of the testator's personal property, to hold for life, with remainder over to others after the death of the first taker, may make a valid assignment of the mortgage, inasmuch as such a sale may be necessary in order to obtain the income and protect the property from loss.⁶

¹ *Bruce v. Bonney*, 12 Gray (Mass.), 107, 110. See § 135.

² *Herring v. Woodhull*, 29 Ill. 92.

³ *Gilson v. Gilson*, 2 Allen (Mass.), 115, 117; *Savary v. Clements*, 8 Gray (Mass.), 155; *Burnett v. Pratt*, 22 Pick. (Mass.) 556.

⁴ *Austin v. Shaw*, 10 Allen (Mass.), 552; *Webster v. Vandeventer*, 6 Gray (Mass.), 428.

⁵ *Webster v. Vandeventer*, *supra*. In this case one of the persons to whom, "as trustees of the society of Shakers in Enfield," a mortgage had been assigned, had left the society and moved away, and engaged in other business. He had moreover received a large sum of money from the society in consideration of his claims.

⁶ *Sutphen v. Ellis*, 35 Mich. 446; and see *Proctor v. Robinson*, *Id.* 284.

796. In general one of two or more executors or administrators may make a valid assignment of a mortgage without the others joining in the act of transfer;¹ and this rule has been held to apply as well to a mortgage taken by executors in their own names as such, after the death of their testator, as to one given to the testator in his lifetime, provided the money when received would be assets of the testator's estate.²

An assignment by the executors of the mortgagee to a son of the testator, who is also a co-executor, is valid.³

An executor or administrator can generally assign a mortgage without a license for that purpose, inasmuch as a mortgage is regarded as only a chattel interest, which immediately vests in the personal representative of the mortgagee upon his decease.⁴

When a mortgage has been foreclosed in the hands of an executor or administrator, the chattel interest of the mortgage has then become real estate, and he should obtain a license of court before selling the premises; yet in such case a conveyance by him without license would not be void, but only voidable by the heirs or creditors of the deceased.⁵

797. Assignment by foreign administrator. — Although a mortgage is regarded as a mere chattel interest, yet a foreign administrator cannot, by virtue of his appointment in another state, assign the mortgage.⁶ Titles to real estate are regulated and established by the *lex loci rei sitæ*; and whenever the official act of an executor or administrator is necessary to make title to real estate, his authority must appear by letters testamentary, or letters of administration granted in the state where the land is situated.⁷ But where a mortgage is not regarded as a title to land but

¹ Bac. Ab. Exr's & Admr's, D.; George v. Baker, 3 Allen (Mass.), 326 n.; Bogert v. Hertell, 4 Hill (N. Y.), 492; Mutual Life Ins. Co. v. Sturges, 33 N. J. Eq. 328.

² Bogert v. Hertell, *supra*; S. C. 9 Paige (N. Y.), 52; 3 Edw. Ch. 20. The court of errors overruled the opinions of the chancellor and vice chancellor to the contrary.

³ Hitchcock v. Merrick, 15 Wis. 522.

⁴ Ladd v. Wiggin, 35 N. H. 421; *Ex parte* Blair, 13 Met. (Mass.) 126; Crooker v. Jewell, 31 Me. 306; Baldwin v. Hatchett, 56 Ala. 461.

In Massachusetts, by statute 1788, c.

51, § 1, sale of a mortgage might be made by an executor or administrator without license of the Probate Court, in case the mortgagee had died "before recovery of seisin and possession." The Rev. Stat. 1836, c. 65, §§ 11, 14, rendered such license necessary. *Ex parte* Blair, 13 Met. 126. But by statute 1849, c. 47, Gen. Stat. c. 96, § 12, and c. 98, § 5, authority was given to make the sale without license.

⁵ Baldwin v. Timmins, 3 Gray (Mass.) 302.

⁶ Cutter v. Davenport, 1 Pick. (Mass.) 81.

⁷ Hutchins v. State Bank, 12 Met. (Mass.) 421, 424.

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merely a lien, a foreign administrator can make a valid assignment,¹ though such administrator could not maintain a suit upon the mortgage.²

798. A treasurer or other officer of a corporation has no authority by virtue of his office merely, and aside from the authority of a by-law or a special power given by the company, to execute an assignment of a mortgage, and his use of the seal of the corporation, of which he has charge, does not serve to give the assignment so made by him any validity.³ Of course a subsequent ratification of the act by the corporation will supply the original want of authority, and make the act valid.

799. If a mortgage be made or assigned to certain persons as trustees of an association not incorporated, the legal title vests in these persons jointly, and no valid assignment can be made by the association, or by one of the mortgagees, but all must join in the deed in order to make a valid assignment.⁴ In the absence of any evidence that power of alienation by such trustees is restrained by the by-laws of the association, their assignment of a mortgage will pass the legal title.⁵

The organization of a voluntary loan fund association into a corporation does not transfer their property without a formal conveyance or assignment.⁶ Neither does the title vest in new trustees who may be elected from time to time, but remains in the original trustees or their survivors until transferred by their deed.⁷

800. A mortgage to a partnership should be assigned by a deed executed by all the partners; for although it belongs to the partnership, the legal estate is in the individual members of it, as tenants in common. One partner cannot make a legal assignment by executing an assignment in the name of the firm;⁸ but he can make an equitable assignment by a transfer of the debt; and therefore a mortgage to a partnership to secure a debt due the firm will equitably pass by an assignment of all debts due the firm, executed in the name of the firm by one member of it.

¹ *Smith v. Tiffany*, 16 Hun (N. Y.), 552.

⁵ *Manahan v. Varnum*, 11 Gray (Mass.) 405.

² § 1389.

⁶ *Manahan v. Varnum*, *supra*; *Holland v. Cruft*, 3 Gray (Mass.), 162, 173.

³ *Jackson v. Campbell*, 5 Wend. (N. Y.) 572.

⁷ *Peabody v. Eastern Methodist Society*, 5 Allen (Mass.), 540.

⁴ *Austin v. Shaw*, 10 Allen (Mass.), 552; *Webster v. Vandeventer*, 6 Gray (Mass.), 428; *Chapin v. First Universalist Church*, 8 Gray (Mass.), 580.

⁸ And see *Dillon v. Brown*, 11 Gray (Mass.), 179. See §§ 119-123.

to secure a debt due from the firm to the assignee.¹ Although it is a general rule that a partner cannot bind his copartners by an instrument under seal, yet as he can make an equitable assignment without using a sealed instrument at all, the addition of a seal does not vitiate such an assignment, any more than the addition of a seal to a bill of sale of goods would vitiate the sale.²

801. Assignment by attorney. — A mortgage being an estate or interest in land can be assigned only by deed. An attorney executing an assignment in behalf of his principal must have authority under seal. That he is an attorney in fact is not sufficient, without a subsequent ratification. But if one partner execute an assignment in behalf of his copartner, in the course of the partnership business, under the authority of the partnership articles which are under seal, and provide that the business of the partnership shall be transacted by the person who executed the assignment, the authority is sufficient. It is not necessary to the validity of a foreclosure of the mortgage so assigned that the authority to execute the assignment should be recorded.³

802. Mortgage of indemnity. — The condition of a mortgage of indemnity is saved if the debt for which the indemnity is taken is paid by the principal debtor, according to its terms. The mortgage in that case never becomes operative and available, and the mortgagee has then no interest which he can assign. It is immaterial in this respect whether the original debt is paid by the mortgagor in money or by a new note, with other sureties; the mortgagee not being upon the renewed note is exonerated and discharged from his liability, and his interest under his mortgage having ceased he cannot pass any interest by an assignment of it, even to the new sureties.⁴

A mortgage of indemnity is assignable after the mortgagee has paid the debt against which he is indemnified; but until that time he has nothing that he can assign.⁵ If, however, he procures

¹ Dubois's App. 38 Pa. St. 231.

² Everit v. Strong, 5 Hill (N. Y.), 163.

³ Morrison v. Mendenhall, 18 Minn.

232. See Atkinson v. Patterson, 46 Vt. 750.

⁴ Abbott v. Upton, 19 Pick. (Mass.)

434; Bonham v. Galloway, 13 Ill. 68.

The condition in this latter case was that if the mortgagor should pay and satisfy his note, by renewal or otherwise, then the mortgage should be void; and it

was renewed with different sureties. One ground of the decision was that a transfer to others was not within the contemplation of the parties at the time of the execution of the mortgage. But the same decision was reached in the former case without this special form of condition. See §§ 379-387.

⁵ Abbott v. Upton, 19 Pick. (Mass.) 434; Wallace v. Goodall, 18 N. H. 439; Hall v. Cushman, 16 Ib. 462; Weeks v.

the payment of the debt by a third person for his benefit, he may transfer the mortgage to such third person as security for the payment, although this be done before the maturity of the debt; and the mortgagor cannot claim that such payment is a performance of the condition of the mortgage, so as to revest the title in him.¹

It must appear, however, that the assignment was made, or at least agreed upon, at the time the assignee paid the debt for which the mortgage was given as indemnity; otherwise, the payment will discharge the debt, and the assignment will not pass any interest as against any intervening interest. Thus, for instance, where a third person under an agreement with the principal debtor, and not with the surety, who held the mortgage, paid the debt in three instalments, but did not take an assignment of the mortgage until the time of paying the last instalment, it was held that, in the absence of proof of any arrangement with the mortgagee for an assignment, the first two payments extinguished the mortgage *pro tanto*, and that it was not in the power of the parties to revive it as against intervening incumbrancers.²

803. The assignment of a mortgage conditioned for the support of the mortgagees, after a breach of the condition, does not operate as a release of the claim for support. The assignee may claim the performance of the condition of the mortgage for the benefit of the mortgagee. The mortgagor has no occasion to object to the assignment. This affects his rights and duties in only one respect; if he has notice of the assignment, he must pay to the assignee any sum that is due as damages for past breaches of the condition to support.³

4. *What constitutes an Assignment.*

804. Assignment of mortgage without the debt. — In general, if an assignment of a mortgage be made without any trans-

Eaton, 15 Ib. 145; and see *Jones v. Quin-nipiac Bank*, 29 Conn. 25; *Carper v. Munger*, 62 Ind. 481.

¹ *Murray v. Catlett*, 4 Greene (Iowa), 108; *Camp v. Smith*, 5 Conn. 80. The condition of the mortgage in this case was that the mortgagor would "well and truly pay said note according to its tenor." Before the maturity of the note he told the

mortgagee that he must provide for the note; and four days before it became due the mortgagee arranged for its payment by another to whom he transferred the mortgage.

² *Pelton v. Knapp*, 21 Wis. 63.

³ See §§ 388-395; *Mitchell v. Burnham*, 57 Me. 314.

fer of the note or bond secured by the mortgage, the assignee takes only a naked legal estate, which he will hold in trust for the owner of the note or other mortgage debt.¹ The transfer of the debt is essential to an effective assignment of the mortgage.

When it is said that a transfer of a mortgage without the debt secured by it is a nullity,² the qualification should be made that where the mortgagee has possession by virtue of his mortgage, or where the mortgagee is not in possession, but the condition has been broken, a conveyance or assignment of the mortgaged premises would be valid to transfer the right of possession.³

A purchaser of the mortgage title, not finding the note in the possession of the mortgagee, is held to take it subject to the rights of any person to whom the mortgage debt has been previously assigned.⁴ If, however, a mortgagee makes a deed or release of the premises or a part of them to a person holding from other sources a valid title to the premises subject only to the incumbrance of the mortgage, and who has no object in acquiring possession of the personal obligation, but is only concerned in perfecting his title, a deed or transfer, unaccompanied with the mortgage debt, avails to discharge the mortgage lien. If, therefore, the purchaser of a portion of an estate subject to a mortgage, which the mortgagee has assigned by an unrecorded assignment, afterwards takes a quitclaim deed of the whole estate from the mortgagee, he acquires a good title to the part which he previously held as against the mortgagee; but as to the residue no such title as would prevail against the prior purchaser of the mortgage debt accompanied by an assignment of the mortgage, though not recorded.⁵ "As a purchaser," says Mr. Justice Dewey, delivering the opinion of the court, "he must have known that the possession of the debt was essential to an effective mortgage,

¹ *Merritt v. Bartholick*, 36 N. Y. 44; *S. v. Lunt*, 71 Me. 377; *Cleveland v. Cohrs*, 10 S. C. 224.

C. 47 Barb. 253; *Aymar v. Bill*, 5 Johns. (N. Y.) Ch. 570; *Jackson v. Willard*, 4 Johns. (N. Y.) 41; *Cooper v. Newland*, 17 Abb. (N. Y.) Pr. 342; *Swan v. Yaple*, 35 Iowa, 248; *Pope v. Jacobus*, 10 Iowa, 262; *Sangster v. Love*, 11 Iowa, 580; *Peters v. Jamestown Bridge Co.* 5 Cal. 334; *Duval v. McLoskey*, 1 Ala. 708; *Carter v. Bennett*, 4 Fla. 283; *Johnson v. Cornett*, 29 Ind. 59; *Bailey v. Gould*, Walk. (Mich.) 478; *Thayer v. Campbell*, 9 Mo. 280; *Bell v. Morse*, 6 N. H. 205; *Hutchins v. Carleton*, 19 N. H. 487; *Lunt*

² *Carpenter v. Longan*, 16 Wall. 271; *Thayer v. Campbell*, 9 Mo. 280.

³ *Pickett v. Jones*, 63 Mo. 195; *Welsh v. Phillips*, 54 Ala. 309; *Campbell v. Birch*, 60 N. Y. 214.

⁴ § 474; *Kellogg v. Smith*, 26 N. Y. 18; *Fletcher v. Carpenter*, 37 Mich. 412; *Haescig v. Brown*, 34 Mich. 503.

⁵ *Wolcott v. Winchester*, 15 Gray (Mass.), 461; and see *Johnson v. Leonards*, 68 Me. 237.

and that without it he could not maintain an action to foreclose the mortgage. The not finding it in the possession of the mortgagee, and not stipulating for any transfer of such debt, are circumstances that should estop him from setting up any title against the *bond fide* purchaser of the debt, who had possession of the bond, and an assignment of the mortgage in due form, to vest the legal estate in him as against the assignor, and only defective as to any others, in not being recorded."

805. An assignment of the mortgage generally carries the debt. The assignment of itself conveys the right to receive payment of the notes, if these be actually sold and delivered to the assignee of the mortgage. In a proceeding to foreclose it is necessary to produce the notes in order to rebut the presumption of payment which would result from their absence. The note is the most direct and proper evidence of the debt. If the note be not produced its absence must be accounted for.¹ But the beneficial interest in the debt is, however, generally included in an assignment of the mortgage, although the terms of the assignment embrace the mortgage alone. This would be the presumed intention of the parties in all cases when the debt has not been already transferred to another,² and an adequate consideration is paid.³ The mortgage being merely an incident of the debt cannot be assigned separately from it, so as to give any beneficial interest. The incident may pass by a grant of the principal, but not the principal by the grant of the incident.⁴

Whether a deed by the mortgagee or a formal assignment of a mortgage by him, without a transfer of the notes, passes the beneficial interest in the security, is a question to be determined by the intention of the parties, which may be gathered not merely from the words of the deed or assignment, but from the situation of the parties and the nature of the transaction.⁵ The mere circumstance that the assignment would be inoperative, unless the debt be held to pass with it, is not sufficient, it would seem, to give the assignment that effect. The result of such holding would be to reverse the maxim that the incident passes by a

¹ King v. Harrington, 2 Aikens (Vt.), 33; Edgell v. Stanford, 3 Vt. 202.

² Northampton Bank v. Balliet, 8 W. & S. (Pa.) 311; Phillips v. Bank of Lewistown, 18 Pa. St. 394; Merritt v. Bartholick, 36 N. Y. 44; S. C. 47 Barb. 253;

Cooper v. Newland, 17 Abb. (N. Y.) Pr. 342.

³ Fletcher v. Carpenter, 37 Mich. 412.

⁴ Hitchcock v. Merrick, 18 Wis. 357; Cleveland v. Cohrs, 10 S. C. 224.

⁵ Bulkley v. Chapman, 9 Conn. 5; and see Strong v. Jackson, 123 Mass. 60.

grant of the principal, and would establish the contrary rule that the principal follows the incident.¹ The fact that an assignment was made at the request of the mortgagor to one who advanced him money at the time is evidence of an agreement between the parties that the mortgage should no longer continue a security for the payment of the debt which it was originally given to secure, but should be security for the debt then created.²

806. The mere delivery of the mortgage deed without the bond or note does not constitute a transfer of it either by way of sale or pledge, though the full consideration was paid or money was advanced upon it.³ There is in such case a presumption against any transfer. In England such a deposit of the papers would constitute a valid lien, and is a very common mode of securing a loan. But in this country, under the recording acts, no lien upon real estate can be created by a deposit of title deeds. Although an assignee by a regular deed of assignment has knowledge that the mortgage has been deposited with a solicitor for the purpose of having an assignment of it made to another, he acquires, by the deed of assignment and an indorsement of the note, a prior lien upon the mortgaged property, and it does not matter that the mortgage deed itself is not delivered to him.

807. When a mortgage has been formally assigned and the mortgage note delivered to the assignee without any indorsement of it, the mortgagor is not justified in refusing payment to the assignee on the ground that the note has not been indorsed by the payee.⁴ The formal assignment, duly acknowledged and recorded, and the possession of the note, are the best possible evidence of ownership, and the assignee is entitled to demand and enforce payment whether the note is indorsed or not. Such an assignment is a good equitable transfer of the mortgage and note.⁵ It is sufficient evidence of an intention to pass the beneficial interest in them.

When, however, there is no separate obligation for the mortgage debt, and no express covenant in the mortgage for the pay-

¹ Per Parker, J., in *Merritt v. Bartholick*, 36 N. Y. 44.

² *Campbell v. Burch*, 1 Lans. (N. Y.) 178.

³ *Bowers v. Johnson*, 49 N. Y. 432; *Merritt v. Bartholick*, 36 N. Y. 44; S. C. 47 Barb. 253; *Warden v. Adams*, 15 Mass. 233. See §§ 179-187, 457.

⁴ *Pease v. Warren*, 29 Mich. 9; and see *King v. Harrington*, 2 Aik. (Vt.) 33. Otherwise, see *Kelly v. Burnham*, 9 N. H. 20; *Thorndike v. Norris*, 24 N. H. 454.

⁵ *Pratt v. Skolfield*, 45 Me. 386. See *Strong v. Jackson*, 123 Mass. 60.

ment of it, then the remedy upon the mortgage is confined to the lands, and an assignment of the mortgage necessarily transfers all the mortgagee's rights under it.¹ The mortgage is then the principal and only thing, and is not an incident to anything else.

The assignee of a mortgage without the debt can maintain no action upon it except at the request of the holder of the bond or note secured by it. Judgment could only be entered upon producing the separate obligation for the debt.² According to the principles of equity courts, the assignee of the legal title, holding it as trustee for the benefit of the holder of the mortgage debt, would be compelled either to foreclose the mortgage for the benefit of the holder of the debt, or to assign it to him.

Contrary to the generally received doctrine, it is held in Illinois that a mortgage cannot be assigned so as to vest the legal title in the assignee, unless the debt secured be of a character assignable at law; or, in other words, unless it be negotiable. If it be negotiable, the assignee becomes the legal holder of the indebtedness, and the mortgage as a mere incident passes with it, and the legal title to that vests in the assignee. Therefore, it is held that a power of sale in a mortgage passes to the assignee in the latter case, and may be exercised by him; but in the former case the assignment vests only an equitable interest in the assignee, and therefore the power can be exercised only by the mortgagee himself.³

808. A deed of release or quitclaim or other conveyance is sufficient to pass the interest of the mortgagee, when there is no separate obligation for the payment of the debt;⁴ and is sufficient also when there is a separate obligation, and this is delivered with the deed.⁵ A warranty deed is not only equally effectual, but would also pass any title subsequently perfected by the mortgagee.⁶ The warranty would also operate as an equitable assign-

¹ *Caryl v. Williams*, 7 Lans. (N. Y.) 416; *Severance v. Griffith*, 2 Ib. 38; *Hone v. Fisher*, 2 Barb. (N. Y.) Ch. 559, 560; *Coleman v. Van Rensselaer*, 44 How. (N. Y.) Pr. 368.

² *Webb v. Flanders*, 32 Me. 175; *Garrow v. Sherman*, 6 N. J. Eq. (2 Halst.) 219.

³ *Mason v. Ainsworth*, 58 Ill. 163.

⁴ *Welch v. Priest*, 8 Allen (Mass.), 165; *Dorkray v. Noble*, 8 Me. 278; *Hill v. More*, 40 Me. 515, 525; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 382; *Freeman v.*

M'Gaw, 15 Pick. (Mass.) 82, 86; *Thompson v. Kenyon*, 100 Mass. 108; *Severance v. Griffith*, 2 Lans. (N. Y.) 38; *Weeks v. Eaton*, 15 N. H. 145. As to the effect of a record of an assignment, see § 474.

⁵ *Dixfield v. Newton*, 41 Me. 221; *Dearborn v. Taylor*, 18 N. H. 153; *Hobson v. Roles*, 20 N. H. 41; *Furbush v. Goodwin*, 25 N. H. 425.

⁶ *Ruggles v. Barton*, 13 Gray (Mass.), 506; *Lawrence v. Stratton*, 6 Cush. (Mass.) 163, 169.

ment of a separate debt.¹ Such also is the effect of a conveyance by one having an absolute title to property which he really holds by mortgage title, if the purchaser from him has notice of the separate defeasance, or of circumstances which make the transaction a mortgage.² There are other cases in which a deed of the land by the mortgagee will pass no interest at all, unless it be a mere naked legal estate. Such is the case when the mortgagee has already transferred the mortgage debt.³ Moreover, the deed alone will not pass the mortgage debt, unless the intention to transfer this as well is expressed in it. This would doubtless be the case when it appeared that the mortgagee had control of the debt, and received full consideration for it.⁴

A conveyance by a mortgagee of a portion of the mortgaged premises by warranty deed operates as an equitable assignment of a proportionate part of the mortgage debt.⁵

Where the legal title is regarded as remaining in the mortgagor, and the mortgagee only acquires a right to enforce payment of his claim, it is held that a deed made by the holder of the mortgage conveying all his "estate, title, and interest" in the real estate mortgaged will not operate as an assignment of the mortgage, for this is a conveyance of the land, in which he has no title. His interest is a chattel interest, inseparable from the debt it was given to secure.⁶ In like manner, it is held that a conveyance by the mortgagee of all his right, title, and interest in the land passes nothing unless the debt be assigned, as the mortgage is a mere security incident to the debt.⁷

It is held that an assignment of a mortgage to be effectual must either be formal or it must appear from the instrument that it was intended to operate as such. A conveyance by the mortgagee before entry for condition broken is inoperative, unless in-

¹ *Welsh v. Phillips*, 54 Ala. 309.

² *Decker v. Leonard*, 6 Lans. (N. Y.) 264; *Leahigh v. White*, 8 Nev. 147.

If the purchaser has not such notice, but in good faith purchases an indefeasible title, the mortgagee will in equity be treated as a constructive trustee for the price for which he sold the land, after deducting therefrom the amount of the mortgage debt. *Linnell v. Lyford*, 72 Me. 280.

³ *Bell v. Morse*, 6 N. H. 205, 210; *Whittemore v. Gibbs*, 24 N. H. 484;

Weeks v. Eaton, 15 N. H. 145; *Furbush v. Goodwin*, 25 N. H. 425; *Hobson v. Roles*, 20 N. H. 41.

⁴ *Ellison v. Daniels*, 11 N. H. 274; *Parish v. Gilmanton*, Ib. 293, 298.

⁵ *Smith v. Hitchcock*, 130 Mass. 570.

⁶ *Swan v. Yapple*, 35 Iowa, 248, and cases cited; and see *Aymar v. Bill*, 5 Johns. (N. Y.) Ch. 570. See §§ 17-59.

⁷ *Peters v. Jamestown Bridge Co.* 5 Cal. 334; *Nagle v. Macy*, 9 Cal. 426, 428; *Delano v. Bennett*, 90 Ill. 533.

tended as an assignment of the mortgage and debt, and such intention be made to appear. Although the mortgage be in the form of an absolute deed and bond for reconveyance, if the bond is recorded with the mortgage the mortgagee cannot convey any interest in the property before condition broken, unless it be by assignment. Unless intended to operate as an assignment of the mortgage and a transfer of the debt, a conveyance by the mortgagee to a third person is entirely inoperative. The intention that a deed shall have this operation must be made to appear.¹

But if the mortgagee be in possession, his conveyance of the mortgaged property by warranty deed or quitclaim is regarded as passing his mortgage interest, although no mention in terms be made of the debt.² It moreover transfers his right of possession, and enables the grantee, and those claiming under him, to maintain an action against any person who does not show a better title.³

809. A deed of the mortgaged premises by the heir of a deceased mortgagee before foreclosure, and before a decree of distribution of the estate, will not operate as an assignment of the mortgage,⁴ and will not even convey any title sufficient to enable the grantee to maintain a writ of entry against such heir, inasmuch as a mortgage is assets in the hands of the personal representative.⁵ The administrator may, notwithstanding such deed, take possession of the premises and foreclose the mortgage, if no redemption be made. The conveyance by the heir does not pass the legal estate, because he has no legal estate in the premises. The mortgage title as well as the debt vests solely in the administrator. If he obtains an irredeemable interest by foreclosure, this is only the perfecting of the interest he already has. He may then sell the lands by license of court for the payment of debts; and if not sold he holds them for the benefit of the same persons, and in the same proportions that he holds the personal estate of the deceased, and they may claim partition accordingly.⁶

But such a deed of the mortgaged property by the heir has

¹ Greve v. Coffin, 14 Minn. 345; Johnson v. Lewis, 13 Minn. 364; Hill v. Edwards, 11 Minn. 22, 29; Gale v. Battin, 12 Minn. 287.

² Lamprey v. Nudd, 29 N. H. 299; Smith v. Smith, 15 N. H. 55; Hinds v. Ballou, 44 N. H. 619.

³ Wallace v. Goodall, 18 N. H. 439; Hutchins v. Carleton, 19 N. H. 487, 514.

⁴ Douglass v. Durin, 51 Me. 121; Albright v. Cobb, 30 Mich. 355.

⁵ Taft v. Stevens, 3 Gray (Mass.), 504.

⁶ Taft v. Stevens, *supra*; Gen. Stat. of Mass. c. 97, § 14.

been held a good assignment in equity against all the world except the personal representative and creditors whose rights might be affected : a stranger not being allowed to question its validity and effect.¹

810. A mortgage of land by one whose only title to it is in mortgage passes his mortgage interest. It is in legal effect an assignment of his mortgage.² Although the debt be not at the time formally transferred with the mortgage, it may well be inferred that the intention of the parties was to make a complete assignment of the mortgage.³

811. A conveyance by a mortgagee of a part of the mortgaged estate to a third person is in like manner regarded as an equitable assignment of the mortgage to the extent of the purchase money of such part, especially when the purchaser has bought in good faith from a mortgagee in possession, with the assurance on his part that he had a perfect title.⁴ "It is as important," says Mr. Justice Hoar,⁵ "to be able to ascertain from the registry the existence or continuance of a mortgage, as of any other legal title. Not infrequently the whole or part of an estate held in mortgage is released or conveyed, when the debt is not paid. And in the absence of fraud, a conveyance by the party who appears on the record to be the owner of the mortgage should be sufficient to protect a purchaser who has no actual or constructive notice of title in any other." Although a transfer by a mortgagee of his entire interest under a mortgage is ineffectual unless accompanied by the mortgage debt, the rule is different when a portion only of the mortgaged premises is conveyed. A purchaser in the latter case, having in view merely to acquire the title to land, has no occasion to acquire the debt, and the absence of it does not imply bad faith on his part.⁶

The mortgagee by a deed to a third person of a part of the mortgaged premises transfers his interest in such portion, but he

¹ *Welsh v. Phillips*, 54 Ala. 309; *Cook v. Parham*, 63 Ala. 456.

² *Murdock v. Chapman*, 9 Gray (Mass.), 156; *Central Bank v. Copeland*, 18 Md. 305.

³ *Dudley v. Cadwell*, 19 Conn. 218.

In this case the mortgage notes were not delivered till long after the making of the mortgage, but the jury found that these were parts of one transaction, and that an assignment of the mortgage was what was really intended.

⁴ *McSorley v. Larissa*, 100 Mass. 270; and see *Wyman v. Hooper*, 2 Gray (Mass.), 141; *Welch v. Priest*, 8 Allen (Mass.), 165; *Grover v. Thatcher*, 4 Gray (Mass.), 526; *Raymond v. Raymond*, 7 Cush. (Mass.) 605, 608; *Johnson v. Leonards*, 68 Me. 237; *Smith v. Hitchcock*, 130 Mass. 570.

⁵ *Welch v. Priest*, *supra*.

⁶ *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

does not discharge it from the mortgage so far as the mortgagor is concerned; only a release to him or payment by him will have that effect.¹

812. An effectual sale under a power in the mortgage,² or an irregular sale under a decree of foreclosure,³ operates as an assignment of the mortgage to the purchaser, if he has paid the purchase money and it has been applied to the payment of the mortgage debt. In like manner the assignment of a decree in a foreclosure suit for a residue of the debt after a sale of the property, if the decree proves to be invalid by reason of there being no personal service or otherwise, will operate as a transfer of the mortgage debt, with authority to enforce it by appropriate remedies.⁴ The assignment of a judgment rendered on the mortgage note or bond is an equitable assignment of the mortgage;⁵ and an assignment of a judgment for a part of the mortgage debt carries an interest *pro tanto* in the mortgage.⁶

As has already been observed, in several of the states a mortgage is considered merely a chattel interest, and not a conveyance of land within the statute of frauds. In these states the technical views of the rights of the parties to a mortgage have given place to the equitable views of it entertained by courts of equity, and a parol assignment is sufficient if accompanied by a transfer of the bond or other evidence of the mortgage debt.

5. *Equitable Assignments.*

813. An equitable assignment of a mortgage may be made by a sale of it, without either a formal transfer of the mortgagee's interest in the property, or an indorsement of the note.

The equitable interest of the purchaser enables him to deal with the mortgage for all beneficial purposes.⁷ He may enforce it against the property and the person liable upon it. Under the old practice this would be done in the name of the assignor

¹ Wyman v. Hooper, 2 Gray (Mass.), 141; Grover v. Thatcher, 4 Ib. 526.

² Brown v. Smith, 116 Mass. 108; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Robinson v. Ryan, 25 N. Y. 320.

³ Brobst v. Brock, 10 Wall, 519; Olmsted v. Elder, 2 Sandf. (N. Y.) 325; Moore v. Cord, 14 Wis. 213; Muir v. Berkshire, 52 Ind. 149; Johnson v. Rob-

ertson, 34 Md. 165; Stackpole v. Robbins, 47 Barb. (N. Y.) 212; and see Hill v. More, 40 Me. 515.

⁴ Lillibridge v. Tregent, 30 Mich. 105; and see Drury v. Morse, 3 Allen (Mass), 445.

⁵ Wayman v. Cochrane, 35 Ill. 152.

⁶ Pattison v. Hull, 9 Cow. (N. Y.) 747.

⁷ Nelson v. Ferris, 30 Mich. 497.

or person in whom the legal title remains;¹ but under the codes adopted in some of the states, by which all actions are prosecuted in the name of the party in interest, the mortgage would be enforced in the purchaser's own name.²

But the mere possession by a third person of a mortgage not assigned, and a note not indorsed by the mortgagee, is not sufficient evidence of his ownership of them to enable him to sustain an action upon them. He must allege and prove his ownership by other evidence.³ He must show that there was an intention to transfer a beneficial interest in the securities by the mere manual delivery of them.⁴ One who, having agreed with the mortgagor to take an assignment of an overdue mortgage, paid the amount of it to the mortgagee and received a delivery of the bond, and also a discharge of the mortgage, which was never recorded, was regarded as having a good equitable assignment of the mortgage.⁵

Where an assignment by a transfer of the note enables the assignee to foreclose the mortgage in his own name, the assignment is in effect not merely an equitable but a legal assignment.⁶ In such case, upon the death of the mortgagee, no beneficial interest in the estate passes to his administrator.⁷

When it plainly appears by the pleadings in an action to foreclose that the debt was assigned, it is not necessary to aver that the mortgage was assigned. It is a conclusion of law that the mortgage passed with the debt as an incident to it.⁸

¹ *Young v. Miller*, 6 Gray (Mass.), 152, 153; *Bryant v. Damon*, Ib. 564; *Partridge v. Partridge*, 38 Pa. St. 78; *Crane v. March*, 4 Pick. (Mass.) 131; *Vose v. Handy*, 2 Me. 322; *Dimon v. Dimon*, 10 N. J. L. (5 Halst.) 156.

² *Sangster v. Love*, 11 Iowa, 580; *Ran-kin v. Major*, 9 Iowa, 297; *Allen v. Pan-coast*, 20 N. J. L. (Spenc.) 68; *Kinna v. Smith*, 3 N. J. Eq. (2 Gr.) 14; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Nixon's Dig.* p. 613; *Mulford v. Peterson*, 35 N. J. L. 127; *Southerin v. Mendum*, 5 N. H. 420; *Crow v. Vance*, 4 Iowa, 434; *Paine v. French*, 4 Ohio, 318, 320; *Williams v. Morancy*, 3 La. Ann. 227; *Clearwater v. Rose*, 1 Blackf. (Ind.) 137, 138; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Green v. Hart*, 1 Johns. (N. Y.) 580;

Austin v. Burbank, 2 Day (Conn.), 474; *Gower v. Howe*, 20 Ind. 396.

In Virginia it is provided by statute that the assignee of any "bond, note, or writing, not negotiable," may assert his equitable title in a court of law, even in his own name. Code, 1873, c. 141, § 17; and see *Garland v. Richeson*, 4 Rand. (Va.), 266; *Clarksons v. Doddridge*, 14 Gratt. (Va.) 42, 44.

³ *Andrews v. Powers*, 35 Wis. 644, and cases cited. See *Haescig v. Brown*, 34 Mich. 503.

⁴ *Strause v. Josephthal*, 77 N. Y. 622.

⁵ *Johnson v. Parmely*, 14 Hun (N. Y.), 398.

⁶ *Southerin v. Mendum*, 5 N. H. 420; *Rigney v. Lovejoy*, 13 N. H. 247.

⁷ *Crosby v. Brownson*, 2 Day (Conn.), 425; *Dudley v. Cadwell*, 19 Conn. 218.

⁸ *Kurtz v. Sponable*, 6 Kans. 395.

A married woman may, without the consent of her husband, make an equitable assignment of a note and mortgage executed to her, by the mere sale and delivery of them, although she could not bind herself by an indorsement of the note.¹

814. After an assignment of the mortgage note the mortgagee cannot discharge the mortgage if the note be negotiable and it be assigned to an innocent party, before due and for a good consideration, although the note be without any consideration; and satisfaction so entered will be vacated by a court of equity.² The holder of the note is entitled to the protection accorded to the holder of commercial paper. He may recover the full amount due on it, and is not limited, in an action to foreclose the mortgage, to the amount he actually paid for the securities, with interest.³ This statement is upon the assumption that there is no statute requiring assignments of mortgages to be recorded. Purchasers are bound to know that if the mortgagee has indorsed the notes before maturity to a *bond fide* holder, the mortgagee has no longer authority to satisfy the mortgage; and therefore they are bound to ascertain whether the mortgagee still held the notes at the time he discharged the mortgage. The notes in such case become the evidence of the mortgagee's authority to enter satisfaction of the lien.⁴

The assignee takes free from existing equities between the mortgagor and mortgagee.⁵ He holds the mortgage by the same title that he holds the notes, and subject to no defence that would not be good against them.⁶ The assignment by express terms may be made subject to all existing equities, as where it contains a clause declaring it "subject, however, to all the rights of the said mortgage in and to the same."⁷

A mortgagee who discharges a mortgage of record after having assigned it, the discharge being effectual because the assignment

¹ Baker v. Armstrong, 57 Ind. 189; Elliott, J.; Swift v. Smith, 102 U. S. 442. Moreau v. Branson, 37 Ind. 195. See, however, Ayres v. Hays, 60 Ind. 452.

² Gordon v. Mulhare, 13 Wis. 22; M'Cormick v. Digby, 8 Blackf. (Ind.) 99; Sample v. Rowe, 24 Ind. 208; Lapping v. Duffy, 47 Ind. 51; Dixon v. Hunter, 57 Ind. 278; Catherwood v. Burrows (Superior Ct. Marion Co. Ind. 1879), 7 Reporter, 492; Gottschalk v. Neal, 6 Mo. App. 597; Vandercreek v. Baker, 48 Iowa, 199.

³ Bange v. Flint, 25 Wis. 544.

⁴ Catherwood v. Burrows, *supra*, per

⁵ Crosby v. Roub, 16 Wis. 616; Andrews v. Hart, 17 Wis. 297; Cornell v. Hichens, 11 Wis. 353; Fisher v. Otis, 3 Chand. (Wis.) 83.

⁶ Martineau v. McCollum, 4 Chand. (Wis.) 153; Cornell v. Hichens, 11 Wis. 353.

⁷ Fisher v. Otis, *supra*.

has not been recorded, is liable to the holder of the mortgage for the amount secured by it; whether his intention in discharging it was fraudulent or not.¹

815. A bond for a conveyance of real estate when assigned as security for a debt is in the nature of a mortgage. The assignee does not acquire by the assignment an absolute and unconditional right to the benefit of the agreement; but he may foreclose the interest of the assignor under the bond, and a sale of such interest vests in the purchaser all the interest which the assignor had by means of it.²

816. A power of attorney to one authorizing him to enforce the payment of a mortgage which is delivered to him without assignment, and of a note also delivered without indorsement, operates as a good equitable assignment, and the mortgagee cannot afterwards make a valid discharge of the mortgage.³

817. If the note or other debts secured by the mortgage be transferred without any formal assignment of the mortgage, or even a delivery of it, the mortgage in equity goes with the debt, unless there be an agreement to the contrary.⁴ The

¹ *Ferris v. Hendrickson*, 1 Edw. (N. Y.) 132.

² *Wilson v. Fatout*, 42 Ind. 52.

³ *Cutler v. Haven*, 8 Pick. (Mass.) 490.

⁴ *Connecticut*: *Lawrence v. Knap*, 1 Root, 248. *Massachusetts*: *Morris v. Bacon*, 123 Mass. 58; *Belcher v. Costello*, 122 Mass. 189; *Wolcott v. Winchester*, 15 Gray, 461. *Vermont*: *Keyes v. Wood*, 21 Vt. 331; *Langdon v. Keith*, 9 Vt. 299; *Pratt v. Bank of Bennington*, 10 Vt. 293; *Nash v. Kelley*, 50 Vt. 425. *New York*: *Neilson v. Blight*, 1 Johns. Cas. 205; *Green v. Hart*, 1 Johns. 580, 590; *Evertson v. Booth*, 19 Johns. 486, 491; *Pattison v. Hull*, 9 Cow. 747; *Jackson v. Blodgett*, 5 Cow. 202; *Langdon v. Buel*, 9 Wend. 80; *Parmelee v. Dann*, 23 Barb. 461. *New Jersey*: *Harris v. Cook*, 28 N. J. Eq. 345; *Galway v. Fullerton*, 17 N. J. Eq. 389, 394; *Denton v. Cole*, 30 N. J. Eq. 244; *Ferry v. Meckert*, 32 N. J. Eq. 38. *New Hampshire*: *Southerin v. Mendum*, 5 N. H. 420; *Downer v. Button*, 26 N. H. 338; *Blake v. Williams*, 36 N. H. 39; *Rigney v. Lovejoy*, 13 N. H. 247; *Smith v. Moore*, 11 N. H. 55; *Page v. Pierce*, 26 N. H. 817. *Mississippi*:

Holmes v. McGinty, 44 Miss. 94; *Dick v. Mawry*, 17 Miss. (9 S. & M.) 448. *Wisconsin*: *Croft v. Bunster*, 9 Wis. 503; *Rick v. Cribb*, 12 Wis. 179; *Fisher v. Otis*, 3 Chand. 83; *Blunt v. Walker*, 11 Wis. 334; *Andrews v. Hart*, 17 Wis. 297; *Martineau v. McCollum*, 4 Chand. 153; *Woodruff v. King*, 47 Wis. 261. *Indiana*: *Burton v. Baxter*, 7 Blackf. 297; *Blair v. Bass*, 4 Ib. 539; *French v. Turner*, 15 Ind. 59. *Kentucky*: *Miles v. Gray*, 4 B. Mon. 417; *Burdett v. Clay*, 8 Ib. 287. *Alabama*: *Prout v. Hoge*, 57 Ala. 28; *Emanuel v. Hunt*, 2 Ala. 190; *Cullum v. Erwin*, 4 Ala. 452; *Graham v. Newman*, 21 Ala. 497; *Center v. P. & M. Bank*, 22 Ala. 743. *California*: *Ord v. McKee*, 5 Cal. 515; *Bennett v. Solomon*, 6 Cal. 134. *Iowa*: *Bank of Indiana v. Anderson*, 14 Iowa, 544; *Crow v. Vance*, 4 Iowa, 434; *Updegraff v. Edwards*, 45 Iowa, 513; *Preston v. Case*, 42 Iowa, 549; *Walker v. Schreiber*, 47 Iowa, 529. *Illinois*: *Pardee v. Lindley*, 31 Ill. 174; *Mapps v. Sharpe*, 32 Ill. 13; *Lucas v. Harris*, 20 Ill. 165; *Vansant v. Allmon*, 23 Ill. 30; *Worcester Nat. Bank v. Cheehey*, 87 Ill. 602. *Pennsylvania*: *Partridge*

mortgage title, if it does not legally pass to the assignee by such assignment, as some authorities hold, remains in the mortgagee as trustee for the holder of the debt, even though the latter did not know at the time of the transfer of the existence of the security. Whenever it comes to his knowledge he may affirm the trust and enforce the security. The only hazard which the equitable assignee takes is that the mortgagee may discharge the mortgage; ¹ unless the assignee be chargeable with notice of the rights or equities of other persons in the mortgage debt and security.² If the mortgagor, after notice of such an assignment, pay the debt to the mortgagee, he does it in his own wrong and must suffer the loss. If the mortgagee pass the legal title to another the latter becomes the trustee of the owner of the note.³

Such an assignment has generally, however, no effect upon the legal estate. It is true, as has already been noticed at length in the first chapter, that by legislative enactment, or by judicial construction in several states, the legal character of a mortgage at common law no longer exists; but generally the distinction is kept up, and "great convenience, if not safety," is found in it.⁴ "The true character of a mortgage," says Chief Justice Shaw,⁵ "is the pledge of real estate to secure the payment of money, or the performance of some other obligation. Its object, from its creation to its redemption or foreclosure, is that of a pledge for such debt or duty. It may, in many aspects, be called a real lien, a chattel interest, a chose in action, and *quasi* personal. But as it binds land, and may lay the foundation of a title to real estate, it assumes in many respects the character of a land title. It is so in its origin, by deed; in the mode of giving it notoriety, by registration; in its transfer, by deed of assignment; its discharge, by deed of release; and in the mortgagee's remedy, by writ of entry against the mortgagor, or other person in possession under him."

v. Partridge, 38 Pa. St. 78; *Donley v. Hays*, 17 Serg. & R. 400. **Louisiana**: *Scott v. Turner*, 15 La. Ann. 346. **Michigan**: *Martin v. McReynolds*, 6 Mich. 70. **Missouri**: *Laberge v. Chauvin*, 2 Mo. 179; *Chappell v. Allen*, 38 Mo. 213; *Potter v. Stevens*, 40 Mo. 229; *De Laureal v. Kemper*, 9 Mo. App. 77. **North Carolina**: *Hyman v. Devereux*, 63 N. C. 624. **Ohio**: *Paine v. French*, 4 Ohio, 318. **Texas**: *Perkins v. Sterne*, 23 Tex. 561. **South**

Carolina: *Muller v. Wadlington*, 5 S. C. 342; *Walker v. Kee*, 14 S. C. 142; *Cleveland v. Cohrs*, 10 S. C. 224. **Maine**: *Vose v. Handy*, 2 Me. 322.

¹ *Morris v. Bacon*, 123 Mass. 58.

² *Strong v. Jackson*, 123 Mass. 60.

³ *Morris v. Bacon*, *supra*; *Welch v. Goodwin*, 123 Mass. 71.

⁴ Chief Justice Shaw, in *Young v. Miller*, 6 Gray (Mass.), 152.

⁵ See *Young v. Miller*, *supra*.

But whatever may be the equitable interest of an assignee having only an equitable assignment of a mortgage, as, for instance, by the delivery of the mortgage note or bond without a formal assignment of the mortgage, he has no legal interest, and cannot sue in *scire facias*,¹ or maintain a writ of ejectment,² or a writ of entry,³ in his own name. Such an assignee at most is only a *cestui que trust* having an equitable interest in the real estate, the legal title to which is held by another, either as an actual or resulting trust. He has no legal interest in the land, and can maintain no action at law in respect to it. His rights are equitable, and must be pursued in a court of equity. He may, however, use the name of the legal holder of the mortgage to enforce the legal rights that appertain to the mortgage.⁴

No one but the holder of the mortgage note can complain that the note has been separated from the mortgage, or the mortgage from the note. The mortgagor is not entitled to any relief in equity on this account.⁵

818. The mere transfer of the debt does not at common law carry with it the mortgage security so far as to vest the legal interest in the purchaser; but only gives him an equitable interest, which must be enforced in the name of the person who still holds the legal title. On the other hand, if the mortgage debt has been paid, a mere naked mortgage title does not avail the mortgagee so as to enable him to maintain an action upon the mortgage. He has a mere naked seisin without any beneficial interest. And if the debt has not been paid, but has been transferred to another person, the beneficial interest no longer exists in the mortgagee, but in the assignee of the debt, who must, however, enforce his security in the name of the mortgagee. A mortgage is available as a security only as it is connected in some way with the debt or duty which it secures. To one who has not the debt, it is of no value as property, as it could at most be only resorted to as a trust for the benefit of the holder of the note.⁶

¹ Partridge v. Partridge, 38 Pa. St. 78.

² Cottrell v. Adams, 2 Biss. 351; Edgerton v. Young, 43 Ill. 464; Kilgour v. Gockley, 83 Ill. 109.

³ Young v. Miller, 6 Gray (Mass.), 152; Bryant v. Damon, Ib. 564; Warden v. Adams, 15 Mass. 233; Dwinel v. Perley,

32 Me. 197; Gould v. Newman, 6 Mass. 239.

⁴ Graham v. Newman, 21 Ala. 497; Kilgour v. Gockley, 83 Ill. 109.

⁵ Matthews v. Warner (C. C. Mass. 1881), 6 Fed. Rep. 461.

⁶ Sanger v. Bancroft, 12 Gray (Mass.), 365, per Dewey, J.

When the debt and the legal title to the mortgaged estate are separated in this way, if the holder of the latter will not voluntarily use this title for the benefit of the person entitled to the use of it, it may be necessary to resort to a bill in equity to charge the party who has the legal title as a trustee for the holder of the debt,¹ or to assign the mortgage to him,² whereupon he will be compelled either to maintain a suit at law, or to foreclose for the benefit of the assignee, or to assign the mortgage to the holder of the debt.³ Courts of law will enforce this equitable principle so far as they are able.

819. The law implies an intention that the mortgagee shall hold the mortgage title in trust, when the only note or bond secured by the mortgage is transferred without a formal assignment of the mortgage, and there is nothing to indicate an intention of the parties that the mortgage security is not to go with it; for except as a security to him the barren fee in the mortgagee is useless.⁴ But the question has been raised whether, in case one of two notes be indorsed without any expression of intent, any resulting trust will be implied in favor of the indorsee, as the mortgagee still has a beneficial interest in the mortgage as security for his remaining note.⁵

820. An assignment by transfer of the debt only is effectual between the parties. The mortgage passes as an incident to the note. No assignment of the mortgage is necessary as between the parties, or as against the mortgagor or others having actual notice of the transfer of the notes. The mortgagor is bound to take notice of such an assignment upon the discharge of his debt, because proper diligence on his part demands that he should require the production of the notes before paying.⁶

But if the mortgagee, while the notes are in the hands of the assignee, cancels the mortgage on receiving payment from the mortgagor, who then makes conveyance or a new mortgage to another person, who acts in good faith and in ignorance of the fact

¹ Per Dewey, J., in *Wolcott v. Winchester*, 15 Gray (Mass.), 461.

² *Morris v. Bacon*, 123 Mass. 58.

³ *Crane v. March*, 4 Pick. (Mass.) 131.

⁴ *Young v. Miller*, 6 Gray (Mass.), 152; *Crane v. March*, 4 Pick. (Mass.) 131, 136; *Wolcott v. Winchester*, 15 Gray (Mass.), 461, 465; *Morris v. Bacon*, 123 Mass. 58; *Mayo v. Merrick*, 127 Mass. 511; *Torrey v. Deavitt*, 53 Vt. 331.

⁵ Per Shaw, C. J., in *Young v. Miller*, 6 Gray (Mass.), 152; per Dewey, Justice, in *Wolcott v. Winchester*, *supra*.

⁶ *Swan v. Yaple*, 35 Iowa, 248; *Bremer Co. Bank v. Eastman*, 34 Iowa, 392; *Crow v. Vance*, 4 Iowa, 434; *Bank of the State v. Anderson*, 14 Iowa, 544; *Pope v. Jacobus*, 10 Iowa, 262; *Torrey v. Deavitt*, 53 Vt. 331, 335.

that the original mortgage had not been paid to the proper party, such purchaser or subsequent mortgagee has the better title.¹ Such subsequent purchaser or mortgagee is not bound to take notice of an assignment by transfer of the notes alone. The assignee of the notes can easily protect himself by requiring an assignment of the mortgage and recording it, and thus give notice of his rights; and if he omits to do this, he should be the party to suffer for the negligence.² Where a mortgagee assigned a note secured by mortgage, and subsequently procured a conveyance in fee of the premises from the mortgagor to himself, and the land was then levied upon and sold as the property of the mortgagee to a third party, the only interest acquired by the purchaser was the equity of redemption.³

The measure of damages in an action by the assignee of the note against the mortgagor for unlawfully releasing the mortgage is the value of the mortgage, not exceeding, however, the amount due upon such note.⁴

821. Assignment of part of the mortgage debt. — There is no doubt that where a mortgage is conditioned to secure the payment of several notes, the mortgagee may, if he choose, assign the whole mortgage interest as security for a part of the notes transferred at the same time, leaving no security in the land for a subsequent assignee of the other notes.⁵ But if the mortgagee in terms assign only such part of the mortgage security as corresponds to the notes transferred, then the holder of the remaining notes is entitled to the remainder of the security.⁶ An assignment of a part of the mortgage notes, in the absence of any contract to the contrary, is held to operate as an assignment of a *pro rata* interest in the mortgage.⁷ The assignee of the mortgage and part of the notes holds the security in trust for the benefit *pro rata* of one who had previously taken the other notes.⁸

The same principle applies when the debt secured is represented by bonds of a railroad company or other corporation.

¹ § 472; *Bank of the State of Ind. v. Anderson*, 14 Iowa, 544; *Walker v. Schreiber*, 47 Iowa, 529; *Howard v. Ross*, 5 Bradw. (Ill.) 456.

² Quoted with approval in *Torrey v. Deavitt*, 53 Vt. 331.

³ *Edgerton v. Young*, 43 Ill. 464; *Campbell v. Carter*, 14 Ill. 286, 289; *Jarvis v. Frink*, 14 Ill. 396, 398.

⁴ *Fox v. Wray*, 56 Ind. 423.

⁵ *Warden v. Adams*, 15 Mass. 233; *Langdon v. Keith*, 9 Vt. 299.

⁶ *Wright v. Parker*, 2 Aik. (Vt.) 212.

⁷ *Keyes v. Wood*, 21 Vt. 331; *Cooper v. Ulmann*, Walk. (Mich.) 251; *Donley v. Hays*, 17 S. & R. (Pa.) 400; *Walker v. Schreiber*, 47 Iowa, 529.

⁸ *Belding v. Manly*, 21 Vt. 550; *Moore v. Ware*, 38 Me. 496.

The security attaches to the bonds in whosoever hands they may be. Moreover an interest coupon detached from the bond and in the hands of another person is still entitled to a proportionate share of the mortgaged security.¹

The rule is also the same if the mortgage debt be in part represented by a note and in part by an open account. The assignment of the note carries a proportionate part of the mortgage security.²

If a mortgage for \$2,750 be assigned "to the extent of \$1,500," being the amount of three of the mortgage notes, the mortgagee holding two other notes under an agreement that his security should not be impaired as to them, the assignee becomes a tenant in common with the mortgagee, each being owner under the mortgage of such part of the estate as the debt due to each bears to the whole mortgage debt. The assignee in such case cannot foreclose the entire mortgage, but only to the extent of his interest.³

822. A mortgagee holding two or more notes secured by one mortgage can transfer the mortgage and one note, so as to give that note priority in satisfaction out of the mortgaged property; ⁴ and an indorsement of one note, with an assignment of the mortgage, is sufficient, in the absence of all circumstances indicating a contrary intention, to give to the holder of such note priority.⁵ The mortgagee may by agreement fix the rights of the holders of the several notes to the mortgage security, and such an agreement may be implied from the circumstances of the transfer.⁶ An assignment of one note without the mortgage may im-

¹ *Müller v. Rutland & Wash. R. R. Co.* 40 Vt. 399; *Jones on R. R. Securities*, ch. ix.

² *Adger v. Pringle*, 11 S. C. 527.

³ *Lane v. Davis*, 14 Allen (Mass.), 225.

⁴ *Wright v. Parker*, 2 Aiken (Vt.), 212; *Cooper v. Ulmann*, Walk. (Mich.) 251; *Bank of England v. Tarleton*, 23 Miss. 173; *Walker v. Dement*, 42 Ill. 272.

In *Langdon v. Keith*, 9 Vt. 299, Mr. Chancellor Collamer adopts the views and language of the court in *Wright v. Parker*, *supra*. "If the mortgagee choose to assign all his interest in the mortgaged premises, to secure but a part of the notes therein, assigned by him, he has a right to

do so, and in such case, no interest in the premises could remain in him."

⁵ § 1701; *Foley v. Rose*, 123 Mass. 557.

⁶ *Grattan v. Wiggins*, 23 Cal. 16, 30, and cases cited; *Mechanics' Bank v. Bank of Niagara*, 9 Wend. (N. Y.) 410.

The assignee of one note, who also has an assignment of the mortgage, may perhaps stand upon another principle of law, namely, that when two or more have equal claims in equity, and one has a legal title, the legal title shall prevail. *Eastman v. Foster*, 8 Met. (Mass.) 19, per Chief Justice Shaw.

According to other authorities, however, the assignment of the mortgage with one note does not necessarily give that note

ply a priority of payment over any notes retained and owned by the mortgagee, and any subsequent indorsement of the other notes would not then destroy the priority of the note transferred.¹

But when there is no such implication of an intention to give priority to the note assigned, the indorsement and delivery of it carries with it a *pro rata* portion of the security and nothing more. This is the generally received doctrine.²

When successive assignments of several notes or bonds secured by a mortgage are made without an assignment of the mortgage, the rule, "*Qui prior in tempore, potior est in jure*," has no application. This is applicable when there are successive charges upon the same property; but as between several obligations secured by the same mortgage, much difficulty might result from the rule, on account of the uncertainty and fraud that might attend an inquiry into the times of the several assignments. And yet in several states the rule has been adopted that the note first falling due has precedence in the application of the security, and is to be first satisfied.³

In the beginning, and as between the original parties, the mortgage stands as a security for all the mortgage notes equally. If the mortgagee assigns one of the notes, retaining the others to-

priority, but operates only as an assignment of the mortgage *pro tanto*. *Stevenson v. Black*, 1 N. J. Eq. (Sax.) 338; *Page v. Pierce*, 26 N. H. 317; *Betz v. Heebner*, 1 Penn. 280; *Ewing v. Arthur*, 1 Humph. (Tenn.) 537.

¹ § 1701; *Foley v. Rose*, 123 Mass. 557; *Richardson v. McKim*, 20 Kans. 346; *Noyes v. White*, 9 Kans. 640. See, however, *Henderson v. Herrod*, 18 Miss. (10 S. & M.) 631.

² *California*: *Phelan v. Olney*, 6 Cal. 478; *Grattan v. Wiggins*, 23 Cal. 16. *Kentucky*: *Stockton v. Johnson*, 6 B. Mon. 408; *Duncan v. Louisville*, 13 Bush, 378; *M'Clanahan v. Chambers*, 1 Mon. 43. *Maine*: *Moore v. Ware*, 38 Me. 496. *Massachusetts*: when not otherwise stipulated, *Bryant v. Damon*, 6 Gray, 564; *Foley v. Rose*, 123 Mass. 557. *Mississippi*: *Terry v. Woods*, 6 Sm. & M. 139; *Henderson v. Herrod*, 10 Ib. 631; *Bank of Eng. v. Tarleton*, 23 Miss. 173; *New Hampshire*: *Page v. Pierce*, 26 N. H. 317; *Johnson v. Brown*, 31 N. H. 405.

New Jersey: *Stevenson v. Black*, 1 N. J. Eq. (Sax.) 338; *Collerd v. Huson*, 34 N. J. Eq. 38. *Vermont*: *Langdon v. Keith*, 9 Vt. 299; *Belding v. Manly*, 21 Vt. 550; *Keyes v. Wood*, 21 Vt. 331. *Other States*: *Swartz v. Leist*, 13 Ohio St. 419; *Herring v. Woodhull*, 29 Ill. 92; *Donley v. Hays*, 17 S. & R. (Pa.) 400; *Hancock's Appeal*, 34 Pa. St. 155; *Lynch v. Hancock*, 14 S. C. 66, 84; *Sample v. Rowe*, 24 Ind. 208; *Rolston v. Brockway*, 23 Wis. 407; *Anderson v. Baumgartner*, 27 Mo. 80; *Noyes v. White*, 9 Kans. 640; *Walker v. Schreiber*, 47 Iowa, 529.

³ §§ 1699-1701; *Stanley v. Beatty*, 4 Ind. 134; *Hough v. Osborne*, 7 Ind. 140; *State Bank v. Tweedy*, 8 Blackf. (Ind.) 447; *Doss v. Ditmars*, 70 Ind. 451; *Wood v. Trask*, 7 Wis. 566; *Grapengether v. Fejervary*, 9 Iowa, 163; *Rankin v. Major*, Ib. 297; *Sangster v. Love*, 11 Iowa, 580; *Hinds v. Mooers*, Ib. 211; *Walker v. Schreiber*, 47 Iowa, 529; *Cullum v. Erwin*, 4 Ala. 452; *M'Vay v. Bloodgood*, 9 Port. (Ala.) 547.

gether with the mortgage, the mortgage will stand as security for all the notes *pro rata*; and this is the case without reference to the time they respectively become due.¹ If there be two mortgage notes, and upon the assignment of the mortgage one of them is indorsed without recourse, and the other is indorsed in blank by the mortgagee, upon foreclosure the notes are entitled to the benefit of the mortgage security *pro rata*, and a decree placing the deficiency altogether upon the indorsed note, and requiring payment of it from the mortgagee, is erroneous.²

An assignment of a mortgage, so far as it secures the payment of the second note named therein, together with the second note with a covenant of warranty against all persons claiming under the assignor, transfers the mortgage as security, first for the payment of the note assigned with it, and then in trust to secure the payment of the other note; and if such assignment is recorded, it charges the estate in the hands of subsequent purchasers of the mortgage with such trust.³ The effect of such an assignment is the same without such a covenant of warranty.⁴

6. *Construction and Effect of Assignments.*

823. *Law of place.* — A mortgage of course takes effect by virtue of the law of the place where the land is situated. But this rule does not extend to an equitable transfer of the mortgage and of the debt to which it is incident. An assignment of the mortgage is a new contract and passes a chattel interest, and the rights of the parties are governed by the law of the place where it is executed.⁵

824. *An ordinary assignment passes nothing beyond the mortgage title.* The words of grant, in an ordinary deed of assignment of a mortgage, do not operate by way of covenant or estoppel beyond the description of the thing assigned; and they cannot have the effect to convey or extinguish any other right or interest the assignor has in the property, as, for instance, a right of entry for breach of a condition subsequent. Neither does an assignment in ordinary form without covenants of warranty estop

¹ See *English v. Carney*, 25 Mich. 178.

⁴ *Foley v. Rose*, 123 Mass. 557.

² *English v. Carney*, *supra*.

⁵ *Dundas v. Bowler*, 3 McLean, 397;

³ *Bryant v. Damon*, 6 Gray (Mass.), 564. See *Norton v. Stone*, 8 Paige (N. Y.), 222.

Hoyt v. Thompson, 19 N. Y. 207; *Bank of England v. Tarleton*, 23 Miss. 173; *Murrell v. Jones*, 40 Miss. 565, 583.

the assignor to set up an after-acquired title;¹ nor does it pass a title to a portion of the premises which the assignor has previously acquired by a purchase under a foreclosure of a prior mortgage of that portion.² By the foreclosure sale the assignor, who has become absolute owner of a part of the premises free from any right of redemption, no longer holds that as mortgagee. The assignment conveys a title in mortgage, and not an absolute title in fee. These are distinct titles. The assignment does not touch the title, which the assignor holds absolutely.

Where one conveyed land upon the express condition that the grantee should within a certain time erect certain buildings on it, and took back a mortgage of it to secure the payment of part of the purchase money, and then by assignment in the usual form sold and conveyed "said mortgage deed, the real estate thereby conveyed, and the promissory note, debt, and claim thereby secured," it was held that only the mortgage title passed to the assignee of the mortgage, subject to be defeated by breach of the condition of the original deed.³ "The real estate thereby conveyed," said Mr. Justice Gray, "was not an absolute title in fee, but a title in mortgage, and, in this case, a title subject to be defeated by the mortgagors' breach of the condition subsequent in the deed to them. The words of grant in the assignment cannot operate by way of covenant or estoppel beyond the description of the thing granted and assigned."

Moreover the assignment of a mortgage of premises upon which the mortgagee has a right of entry for a breach of a condition subsequent, as, for instance, a condition for the payment of prior mortgages upon the property, does not convey or extinguish the right of entry,⁴ although an absolute alienation in fee before an entry for the breach would extinguish the right or possibility of reverter;⁵ for, as Coke expresses it,⁶ "Nothing in action, entry, or reëntury can be granted over;" and the reason he gives for the rule is "for avoiding of maintenance, suppressing

¹ *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554.

² *Durgin v. Busfield*, 114 Mass. 492. The words of the assignment were: "Sell, assign, transfer, set over, and convey said mortgage deed, the real estate thereby conveyed, and the promissory note, debt, and claim thereby secured." And see *Barnstable Savings Bank v. Barrett*, 122 Mass. 172; § 972.

³ *Merritt v. Harris*, 102 Mass. 326, and cases cited.

⁴ *Hancock v. Carlton*, 6 Gray (Mass.), 39; *Richardson v. Cambridge*, 2 Allen (Mass.), 118; *Merritt v. Harris*, 102 Mass. 326.

⁵ *Rice v. Boston & Worcester R. R. Co.* 12 Allen (Mass.), 141, and cases cited.

⁶ *Co. Litt.* 214 a; and see *Co. Litt.* 369 a.

of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession."

It is generally true, however, that one assigning a bond and mortgage impliedly warrants their validity, and is liable for a breach of such implied warranty,¹ if he had knowledge at the time of the transfer of their invalidity. But if he has no knowledge of any defect, it would seem that he could not be held liable for a loss sustained by the assignee by reason of any invalidity.² A warranty of the validity of a mortgage is a warranty, in effect, that the bond as well as the mortgage is valid; for if the bond be invalid, the mortgage, which is dependent upon the debt, is invalid also.³ But ordinarily an assignment of a mortgage does not in any way warrant the title to the mortgaged property; and a court of equity cannot relieve a purchaser of a mortgage of land, the title of which proves defective, unless the seller made representations respecting the title upon which the purchaser was justified in relying.⁴

Ordinarily an assignment does not charge the assignor with any liability to make good the mortgage debt assigned; but he may, by special terms in the assignment, guarantee the debt just as he could make any guaranty. A guaranty of the assignee against loss from the mortgage is a guaranty limited to the amount paid on the assignment.⁵ If an assignee having a guaranty unreasonably delay the collection of the mortgage, and in the mean time the property depreciates in value, the guarantor is released.⁶

825. A mortgagor cannot set up an after-acquired title as against his covenants of warranty. Having bought land and given a mortgage for the purchase money containing covenants of warranty he cannot set up a title adversely to an assignee of his mortgage, although he acquire such title under a sale for taxes assessed upon the land before he bought it. Such title enures instantly to the benefit of the assignee.⁷

826. An equitable assignment carries a power of sale, in those states where a mortgage is regarded as merely a lien and not as an estate in the land. An assignment of the note carries

¹ *Ross v. Terry*, 63 N. Y. 613.

² *Littauer v. Goldman*, 72 N. Y. 506;

Fant v. Fant, 17 Gratt. (Va.) 11.

³ *Ross v. Terry*, *supra*.

⁴ *Vincent v. Berry*, 46 Iowa. 571.

⁵ *Griffith v. Robertson*, 15 Hun (N. Y.), 344. See § 829.

⁶ *Griffith v. Robertson*, *supra*. See §§ 1432, 1710.

⁷ See §§ 679, 682, 1483; *Gardiner v. Gerrish*, 23 Me. 46.

with it as an incident the mortgage, which may be enforced in the name of the assignee, and an indorsement and delivery of the note without a formal assignment of the mortgage vests the power of sale in the assignee. The power passes from the mortgagee, and can no longer be executed by him.¹ But in Illinois it is held that an assignment of the mortgage without an indorsement of the note, inasmuch as the mortgage is not assignable, either at common law or by statute, in that state, will not pass the power of sale to the assignee, but it will still remain in the mortgagee, who alone can exercise it.²

827. An assignment of a mortgage may in equity be shown to be in fact collateral security for a loan, though it be absolute in form. Such evidence does not vary or contradict the writing, but establishes a limitation inherent in the transaction, and a court of equity will restrict it accordingly.³ When the mortgage secures a negotiable note, the assignee who has taken it as collateral security, by an absolute assignment in the usual form, though for only a small part of the amount secured by the mortgage, may himself assign it to another; and this second assignee, if he has taken it before it was due, for full value, without notice of the limited interest of the assignor, may enforce it for the full amount.⁴ But if the debt secured be a bond or other non-negotiable instrument, the second assignee would in such case acquire only the right and interest of the first assignee;⁵ and the assignor who pledged the mortgage can redeem upon paying the amount of the loan for which it was pledged, in whose-soever hands he may find it.⁶

If such assignee foreclose the mortgage and at the sale bids it in for a sum less than the amount of the debt which the assignment was made to secure, inasmuch as he holds the mortgage after satisfying his own claim as trustee for his assignor, he is not allowed to purchase the premises for his own benefit, but they are in his hands subject to be redeemed by his *cestui que trust*.⁷ The effect of the foreclosure in such case is simply to bar

¹ *Olds v. Cummings*, 31 Ill. 188; *Pardee v. Lindley*, *Id.* 174.

² *Hamilton v. Lubukee*, 51 Ill. 415.

³ *Pond v. Eddy*, 113 Mass. 149.

⁴ *Briggs v. Rice*, 130 Mass. 50. The recital in the assignment of the consideration for which the assignment was made is not alone sufficient to put the assignee upon inquiry, or to prove fraud on his

part. See *Norman v. Towne*, 130 Mass. 52.

⁵ *Bush v. Lathrop*, 22 N. Y. 535; *United States v. Sturges*, 1 Paine, 525.

⁶ *Sweet v. Van Wyck*, 3 Barb. (N. Y.) Ch. 647.

⁷ *Hoyt v. Martense*, 16 N. Y. 231; and see *Slee v. Manhattan Co.* 1 Paige (N. Y.), 48.

the equity of the mortgagor and his grantees in the land, and it has no operation upon the rights of the assignor and his assignee holding it as collateral security for an amount less than the mortgage debt. The assignee holds the mortgage only as security for the debt due him, and as trustee for his assignor for any surplus. The equitable rule, therefore, which forbids a trustee or person acting in a fiduciary capacity from speculating upon the subject of the trust, applies as well after the foreclosure and sale as before.

If a mortgagee in possession assign his mortgage as collateral security for a debt, this is an admission, which the mortgagor may avail himself of, that it is a subsisting security.¹

When a mortgage fraudulent in its inception, as against the mortgagor's creditors, is assigned to one who has knowledge of the fraud, he stands in no better situation to enforce it or to claim protection under it than a party to the original fraudulent transaction.² The law will lend him no aid whatever for either purpose. The burden, however, of proving that the assignee took the mortgage with notice, or that he is not a *bona fide* purchaser, is on the party who sets up the fraud.³

The title to a mortgage that was fraudulent in its inception as against the mortgagor's creditors becomes valid in the hands of one who has purchased it in good faith without notice of the fraud. The contrary of this was asserted in some of the earlier cases in this country, upon a distinction taken between a conveyance fraudulent as against creditors and one fraudulent against subsequent purchasers; the former being held absolutely void, and the latter voidable only. But this distinction is rejected by all the later authorities, and the conveyance in both cases held to be voidable only.⁴

It is competent to prove by parol that a mortgage was not assigned absolutely but as collateral security; and to show, too, that in assigning a mortgage for a larger amount, the assignor intended, by a statement that there is to be a credit upon the mortgage re-

¹ *Borst v. Boyd*, 3 Sandf. (N. Y.) Ch. Miss. (11 S. & M.) 469; *Langdon v. 501*; *Hansard v. Hardy*, 18 Ves. 455, 459. Keith, 9 Vt. 299.

² *Danbury v. Robinson*, 14 N. J. Eq. ⁴ See *Danbury v. Robinson*, 14 N. J. Eq. 213, where the earlier cases are cited and commented upon; and see *Oriental Bank v. Haskins*, 3 Met. (Mass.) 332.

³ *Marshall v. Billingsly*, 7 Ind. 250; *Farmers' Bank of Va. v. Douglass*, 19

ducing it to a sum named, to reserve to himself the amount of the mortgage over that sum.¹

828. Assignment induced by fraudulent representations.—If the holder of a mortgage made by a third person induces another to take an assignment of it by representations as to the responsibility of the mortgagor and the value of the security, which are false in fact, though honestly made in the belief that they are true, and they are relied upon by the purchaser, they are in legal effect fraudulent;² and the assignee may reclaim the consideration. He must have used, however, reasonable care in the transaction, and diligence in discovering the facts afterwards. Something more than mere failure of consideration is requisite to entitle him to reclamation;³ either fraud in fact or in legal effect is necessary.⁴

Although an assignment of a mortgage be made for the purpose of hindering, delaying, and defeating the assignor's creditors, if the assignee purchases it in good faith for value, without notice of the fraudulent intent of the assignor, or of circumstances which should have put him upon inquiry, his title cannot be impeached. As against him it does not avail to show that the debtor's assignment was fraudulent, unless it be also shown that the assignee participated in the fraudulent intent, or took it under such circumstances that he is chargeable with notice of the fraudulent intent on the part of the assignor.⁵

829. In general, it may be said that an assignment of a mortgage is an assignment of all the securities which the assignor holds against the mortgagor or others for the same debt, and not merely of the claim against the mortgagor.⁶ It transfers any judgments that may have been obtained against indorsers or others. It passes, also, a mortgage given as collateral security to the mortgage debt assigned.⁷

830. The assignment of a mortgage does not carry with it a separate contract of guaranty of the payment of the mortgage debt, if that is strictly a personal engagement, and it is construed to be such when it is made to the holder of the mortgage by

¹ *Wormuth v. Tracy*, 15 Hun (N. Y.), 180.

² *Webster v. Bailey*, 31 Mich. 36. See *Goninan v. Stephenson*, 24 Wis. 75; *McCandless v. Engle*, 51 Pa. St. 309.

³ *Butman v. Hussey*, 30 Me. 263.

⁴ *Peabody v. Fenton*, 3 Barb. (N. Y.) Ch. 451.

⁵ *Tantum v. Green*, 21 N. J. Eq. 364; and see *Gray v. Schenck*, 4 N. Y. 460; *Sprague v. Graham*, 29 Me. 160.

⁶ *Philips v. Bank of Lewistown*, 18 Pa. St. 394. See § 834.

⁷ *Philips v. Bank of Lewistown*, *supra*.

name, "his executors and administrators." The surety is not holden beyond the precise terms of his contract, and these words, in their plain and natural import, do not signify any intention to indemnify any one but the person to whom it was given. This person having put it out of his power to receive payment, the purpose of the guaranty is accomplished and the guarantor is discharged.¹

831. There is an implied covenant in an assignment of a mortgage that the assignor will not receive the money on the instrument assigned, or that if he does he will pay it over to the assignee. This is the assignee's only security until he gives notice to the mortgagor. If the assignee omits to give such notice, and the mortgagor pays the mortgage to the assignor, the assignee's only remedy is upon this implied covenant.²

On the other hand, after such assignment and notice to the mortgagor, the latter cannot, upon the subsequent insolvency of the mortgagee, purchase desperate claims against him, and tender them in payment of the debt, although the mortgage has been assigned only as collateral security. The debtor is bound to respect the rights of the holder of the debt, and knowing those rights he cannot, according to the rules of equity, or the principles of the common law, defeat them.³ This is a different question from that which arises when the rights and equities of the debtor exist at *the time of the assignment*.

There is no implied warranty of the solvency of the mortgagor, though there is such a warranty that the mortgage debt has not already been paid. But in case it has been paid the assignor is liable, not on the contract of assignment, but for the return of the money or thing received for the assignment.⁴

832. Usury. — If a mortgage be untainted with usury in its origin it is not invalidated by a subsequent usurious transfer, as, for instance, by being pledged as security for a usurious loan.⁵ The assignee who has received the usury may be liable to his assignor for the usury taken; but the mortgage itself remains a valid security in his hands against the mortgagor and the mortgaged property.

¹ Smith v. Starr, 4 Hun (N. Y.), 123.

² Horstman v. Gerker, 49 Pa. St. 282.

³ Phillips v. Bank of Lewistown, 18 Pa. St. 394, 403. See Northampton Bank v. Balliet, 8 W. & S. (Pa.) 311.

⁴ French v. Turner, 15 Ind. 59

⁵ Pearsall v. Kingsland, 3 Edw. (N. Y.)

195; Warner v. Gouverneur, 1 Barb. (N.

Y.) 36; and see Lovett v. Dimond, 4

Edw. (N. Y.) 22; Donnington v. Meeker,

11 N. J. Eq. (3 Stockt.) 362.

833. An assignment of a mortgage may be cancelled before it is recorded, and the note being indorsed back to the mortgagee he may maintain a writ of entry to foreclose the mortgage. The voluntary surrender of the only legal evidence by which the assignee could establish his claim may be regarded as in the nature of an estoppel. By cancelling the assignment the assignee voluntarily precludes himself from resorting to it.¹ Moreover, upon the retransfer of the note, the assignee has no equitable interest in the mortgage. If, therefore, the assignment is rendered useless and ineffectual to the assignee, the mortgage remains undischarged and in full force, and the right of enforcing it must be vested in the mortgagee, who alone has any interest in it.

7. *Whether an Assignee takes subject to Equities.*

834. An assignee for value of a negotiable note before due takes it free from equities. At common law, so far as a mortgage is merely a debt or security for a debt, it is a chose in action not negotiable, and therefore not assignable. So far as a mortgage is a conveyance of the legal estate, an assignment or conveyance of such estate may be made by a deed in the usual form. A mortgage note, if negotiable in form, is of course assignable by indorsement, and the assignee takes the legal title to it.

But the debt being the principal thing imparts its character to the mortgage; and although the mortgage itself in the beginning is only assignable in equity, the legal rights and remedies upon the debt have become fixed upon this incident of the debt, and the equitable principles in regard to the mortgage have become naturalized in the common law system. When, therefore, the debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note by the commercial law, when assigned for value before maturity, passes to the assignee free of all equitable defences to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith be-

¹ *Howe v. Wilder*, 11 Gray (Mass.), 267.

fore maturity, takes it free from any equities existing between the original parties.¹

The fact that the note is payable several years after date, or that it has a memorandum upon its face that it is secured by a mortgage upon land, does not affect its negotiability.²

A transfer of a note and mortgage made by a separate instrument, such as a negotiable bond of a corporation, which recites that the note and mortgage are transferred as security for the bond, and are transferable only in connection with it, is held in Wisconsin to be in effect an indorsement of the note, such as

¹ *Beals v. Neddo* (C. C. Kans. 1880), 2 Fed. Rep. 41; *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, Ib. 452; *Sawyer v. Prickett*, 19 Ib. 146, 166; *Paige v. Chapman*, 58 N. H. 333; *Hayden v. Drury* (C. C. Ill. 1880), 3 Fed. Rep. 782; *Taylor v. Page*, 6 Allen (Mass.), 86; *Sprague v. Graham*, 29 Me. 160; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 4 Thomp. & C. (N. Y.) 128; *S. C. 1 Hun*, 566; *Dutton v. Ives*, 5 Mich. 515; *Cicotte v. Gagnier*, 2 Mich. 381; *Bloomer v. Henderson*, 8 Mich. 395; *Reeves v. Scully*, Walk. (Mich.) 248; *Jones v. Smith*, 22 Mich. 360; *Helmer v. Krollick*, 36 Mich. 371; *Croft v. Bunster*, 9 Wis. 503, 510; *Cornell v. Hichens*, 11 Wis. 353; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Martineau v. McCollum*, 4 Ib. 153; *Kelley v. Whitney*, 45 Wis. 110; *S. C. 7 Reporter*, 126; *Burbans v. Hutcheson*, 25 Kans. 625; *S. C. 13 C. L. J. 56*; *Webb v. Hoselton*, 4 Neb. 308; *Preston v. Case*, 42 Iowa, 549; *Updegraff v. Edwards*, 45 Iowa 513; *Farmers' Nat. Bank of Salem v. Fletcher*, 44 Iowa, 232; *Duncan v. Louisville, &c.* 13 Bush (Ky.), 378; *Billgery v. Ferguson*, 30 La. Ann. 84; *Logan v. Smith*, 62 Mo. 455, overruling an earlier case; *Catherwood v. Burrows* (Superior Ct. Marion Co. Ind. 1879), 7 Reporter, 492; *Gabbert v. Schwartz*, 69 Ind. 450.

In *New Jersey* it is provided by statute that mortgages shall be assignable at law, and that the assignee may sue in his own name; but that in such suit there shall be allowed all just set-offs and other defences against the assignor that would have been allowed in any action brought

by him and existing before the defendant had notice of such assignment, and all payments made to the assignor in good faith before such notice. Rev. 1877, p. 708.

In *New York* a bond is almost exclusively used in connection with a mortgage. In the recent case of *Union College v. Wheeler*, 61 N. Y. 88, Mr. Commissioner Dwight, referring to the cases cited in support of the rule above stated, said: "These cases have not yet become established law in this state. If sound, they must be made to rest on rules of law attending the transfer of negotiable paper, and cannot be held by indirection to overthrow a rule concerning the ordinary bond and mortgage which has become fixed in our jurisprudence." Likewise in *Pennsylvania* a bond instead of a note is almost always used. Mr. Justice Thompson said, in *Horstman v. Gerker*, 49 Pa. St. 282, that although a mortgage "may be assigned so as to permit the assignee to sue in his own name, yet it is subject to the same equities and rules that govern other non-negotiable instruments or claims." No case involving the question of the admissibility of equities against the holder of a negotiable note secured by a mortgage has been noticed. See *Pryor v. Wood*, 31 Pa. St. 142; *Twitshell v. McMurtrie*, 77 Pa. St. 383. But a creditor taking an assignment of a mortgage as security for a pre-existing indebtedness is not a purchaser, but holds it subject to equities. *Ashton's Appeal*, 73 Pa. St. 183.

² *Duncan v. Louisville, &c.* 13 Bush (Ky.), 378.

WHETHER ASSIGNEE TAKES SUBJECT TO EQUITIES. [§§ 835-837.

authorizes a holder, who takes it for value before due, without notice of any defence, to enforce it against the maker. Such assignee is regarded as the holder of the legal title free from all equities.¹

835. In such case it does not matter that the consideration of the mortgage was wholly void, as where the consideration was the price of intoxicating liquors sold in violation of law;² or that the mortgage was originally given without consideration.³ The negotiable note secured by the mortgage is valid in the hands of a *bond fide* indorsee for value without notice of the illegal consideration for which it was given. When the mortgage is assigned at the time when the note is indorsed, there is no principle or authority which makes the mortgage less valid than the note.

A *bond fide* assignee for value of a mortgage of land may enforce it by foreclosure, although it was originally given as consideration for a transfer of the land fraudulent as to creditors, and such transfer has been adjudged void. The parties engaged in such fraud are estopped from setting it up.⁴

836. An exception to this general rule occurs when the assignment by its terms is made subject to the rights of the mortgagor. Thus, for instance, where a mortgage made partly to secure future advances was assigned by the mortgagee by a deed which purported to transfer all his right, title, and estate in the mortgaged premises, and the debt or note secured by the mortgage, subject, however, to all the rights of the mortgagor in and to the same, it was held that the assignee took no greater rights than the mortgagee himself had.⁵ This decision was placed upon the ground that this language was used in its ordinary and current meaning, and not in any special and technical sense, and that the natural construction of it is that it preserves all the equities of the mortgagor; and this construction, not being inconsistent with the purpose and intention of the instrument, must prevail.

837. If the mortgage note be indorsed before maturity, and the mortgage delivered without any assignment of it at the

¹ Bange v. Flint, 25 Wis. 544; Crosby v. Roub, 16 Wis. 616; Murphy v. Dunning, 30 Wis. 296; Callanan v. Judd, 23 Wis. 343; City Bank v. McClellan, 21 Wis. 112. *Contra*, in Iowa: Franklin v. Twogood, 18 Iowa, 515; 25 Ib. 590.

² Taylor v. Page, 6 Allen (Mass.), 86.

³ Paige v. Chapman, 58 N. H. 333.

⁴ Smart v. Bement, 4 Abb. (N. Y.) App. Dec. 253.

⁵ Fisher v. Otis, 3 Chand. (Wis.) 83.

time, or be not delivered at all, the indorsee acquires an interest in the mortgage which he may enforce through the mortgagee as holding it for his benefit;¹ and the owner of the equity of redemption cannot in a suit to redeem set off against the indorsee claims he holds against the mortgagee acquired after such indorsement and delivery, and before the mortgage was assigned formally to the purchaser.²

But the mere delivery of a negotiable note secured by mortgage, without indorsement, gives the assignee no protection against the equities existing in favor of the maker of the securities, because the note must necessarily be enforced in the name of such assignor.³ Moreover, such holder of an unindorsed note, without an assignment of the mortgage, can claim no interest in security as against a subsequent legal assignee in good faith of the mortgage, and of a duplicate note obtained from the mortgagor by the artifice of the mortgagee. The purchaser, taking a formal assignment of the mortgage and indorsement of the note, may properly rely upon the record. Having no actual or constructive notice of title in any other than the party who appears by the record to be the owner of the mortgage, he is entitled to the protection of the record.⁴ Such a case is quite different from one where the mortgage note was indorsed to a holder for value, and afterwards the mortgagee assigned the mortgage to another and delivered to him another note similar in terms to that described in the mortgage, but not the genuine note. In the latter case the indorsee of the mortgage note is entitled in equity to an assignment of the mortgage, which the mortgagee or any subsequent assignee from him holds in trust for the legal assignee of the debt.⁵ But if a recorded assignment shows that the mortgage debt has already been assigned, a subsequent transfer of the mortgage note accompanied by an assignment of the mortgage confers no title to the mortgage debt. Thus, where a mortgage with a mortgage note indorsed in blank, and having a memorandum upon it that it was secured by mortgage upon real estate, was transferred by an assignment, which purported upon its face to be made as collateral to a note of the assignor of less amount, and the assignee afterwards indorsed the smaller note, retaining

¹ *Green v. Hart*, 1 Johns. (N. Y.) 580; *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; per Shaw, C. J., in *Young v. Miller*, 6 Gray (Mass.), 152; *Morris v. Bacon*, 123 Mass. 58.

² *Breen v. Seward*, 11 Gray (Mass.), 118.

³ *Blunt v. Norris*, 123 Mass. 55.

⁴ *Blunt v. Norris*, *supra*.

⁵ *Morris v. Bacon*, 123 Mass. 58.

the mortgage note, and transferred the mortgage by an assignment in like words to the first assignment, the assignments being duly recorded, the latter assignee acquired a title to the mortgage debt which the holder of the mortgage note could not impair by a subsequent transfer of that note, accompanied by an assignment of the mortgage. A purchaser of the mortgage note, after the record of the previous assignment and under the circumstances of the case, could not be regarded as an innocent purchaser for value without notice.¹

But an assignment of the mortgage without the debt transfers only a naked trust, and the mortgagor is still entitled to all the equities existing in his favor against the note, in the same manner as if the mortgage had not been assigned.² In such case, even if the mortgage was assigned in part fulfilment of a promise to transfer both as a gift, and the note be not delivered, there is no transfer of the debt.³

If a mortgage purporting to secure a promissory note be executed without the delivery of any note, an assignee of the mortgage takes it subject to all equities existing between the original parties.⁴

838. Contrary to the general doctrine, it is held in a few states, that although the mortgage note is negotiable, the mortgage itself is only assignable in equity, and therefore the assignee having to resort to equity to enforce his rights is compelled to do equity towards the mortgagor, and allow him all the rights of defence he had against the mortgagee.⁵ Although the purchaser of a note before maturity takes it subject to no equities existing between the original parties, yet if it is secured by mortgage the non-assignable character of the security qualifies his rights and remedies upon the note, and makes it subject to the defences and equities to which it was liable in the hands of the assignor.

A mortgage distinct from the debt has no value in itself, and, if assigned, the assignee holds it in trust for the holder of the note or debt. The mortgage is not assignable either by statute or by the common law.⁶ The mortgage follows the notes only in equity, and is subject in the hands of the assignee to any defence which would avail against it in the hands of the mortgagee him-

¹ Strong v. Jackson, 123 Mass. 60.

² Pope v. Jacobus, 10 Iowa, 262.

³ Wilson v. Carpenter, 17 Wis. 512.

⁴ Burbank v. Warwick, 52 Iowa, 493.

⁵ Johnson v. Carpenter, 7 Minn. 176 ;
Hostetter v. Alexander, 22 Minn. 559 ;
Bouligny v. Fortier, 17 La. Ann. 121.

⁶ Medley v. Elliott, 62 Ill. 532.

self, although the assignee may have purchased the note in good faith, for a valuable consideration and before maturity.¹ By the assignment of the notes the assignee obtained an equitable interest in the mortgage, which courts of equity, under certain circumstances, will enforce, if it can be done without a violation of the equitable rights of others. He who buys that which is not assignable at law, relying upon a court of chancery to protect and enforce his rights, takes it subject to all infirmities to which it is liable in the hands of the assignor.

This is the view taken by the courts in Illinois,² Ohio,³ and Oregon.⁴

In New Jersey it is provided by statute that in a suit by an assignee of a mortgage all just set-offs and other defences shall be allowed against him which would have been allowed if his assignor had brought the action.⁵

839. The ground upon which the decisions rest is chiefly, that while notes are made negotiable by commercial usage, or by statute, there is no such usage or provision as to mortgages, and therefore the assignee of a mortgage takes it as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder.⁶

This view was adopted in the Territory of Colorado in a case where the mortgagee had a pledge of personal property in addition to the note and mortgage, which were assigned before maturity to a *bond fide* purchaser. Previous to the assignment a part of the debt had been paid by a sale of a portion of the property

¹ *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Fortier v. Darst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531. The assignment of the notes carries the security of a deed made in trust to another person, and a court of equity will compel the trustee to sell for the benefit of the holder of the notes. *Sargent v. Howe*, 21 Ill. 148.

² *Olds v. Cummings*, 31 Ill. 188, 192; *Walker v. Dement*, 42 Ill. 273; *Bryant v. Vix*, 83 Ill. 11; *Fortier v. Darst*, 31 Ill. 212; *Darst v. Gale*, 83 Ill. 136, 137; *Jenkins v. Bauer*, 8 Bradw. 634; *Foster v. Strong*, 5 Ib. 223; *Grassly v. Reinback*, 4 Ib. 341; *Ellis v. Sisson*, 96 Ill. 105; *United States Mortgage Co. v. Gross*, 93 Ill. 483; *Chicago, Danville & Vincennes Ry. Co. v. Lauenenthal*, 93 Ill. 433.

³ *Baily v. Smith*, 14 Ohio St. 396.

⁴ *Corbett v. Woodward*, 5 Sawyer, 403; S. C. 11 Chicago L. N. 246.

⁵ R. S. 1877, p. 708, § 31; *Woodruff v. Morristown Inst. for Savings*, 34 N. J. Eq. 174, 179.

⁶ The doctrine that an assignee can enforce the mortgage for no more than is due as between the mortgagor and mortgagee had its origin at a time when the practice of giving mortgages as collateral security for negotiable paper was unknown, and rested upon the ground that in an action at law on the covenant or bond in general use, such was the rule. *Duncan v. Louisville, &c. 13 Bush (Ky.)*, 378, per Cofer, J.

pledged, but no credit was indorsed on the note. It was held that a mortgagor, in a suit by the assignee to foreclose the mortgage, was entitled to be credited with such payment.¹

840. The generally accepted doctrine was affirmed by the Supreme Court of the United States that the assignee for value before maturity of a negotiable note and a mortgage securing it is unaffected by any equities to which it would be subject in the hands of the mortgagee, and of which the assignee had no notice.² Mr. Justice Swayne answers the view of the last named case taken in the lower court, and in the decisions with which that is in accord. "The transfer of the note," he says, "carries with it the security, without any formal assignment or delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognizes it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action where such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

841. When the note secured is overdue or non-negotiable, one who takes an assignment of the mortgage is no longer entitled to this protection, but takes it subject to all defences which the mortgagor might have set up against the original mortgagee, although he has no notice of any such defence, and there is noth-

¹ Longan v. Carpenter, 1 Colo. 205.

² Carpenter v. Longan, 16 Wall. 271.

ing upon the face of the papers to indicate it. The mortgage and note are subject to the same equities that the note would be subject to if not secured.¹

But when it is said that an assignee of a mortgage and note when overdue takes them subject to the equities existing between the parties to the mortgage, it is to be understood that only such equities attach as attach to that particular note, and would be available between those parties to control, qualify, or extinguish the demand. The only defences against which such an assignee has to guard against are those which have arisen since the execution of the note, and which are not collateral but relate to the note itself; and those which are inherent in the note, and would show it to have been void *ab initio*, such as fraud, mistake, or absence of consideration. Therefore, where a mortgage note was indorsed and the mortgage assigned after maturity by the mortgagee to his attorney for the purpose of collection, and the latter sold and transferred the same to an innocent purchaser for value, and without notice of the want of authority in the attorney or of his fraud upon his client, no relief can be afforded the latter. Moreover, as the loss must fall in such case upon one of two innocent parties, it should fall upon him who has most trusted the party through whom the loss came; and in this case the loss should fall upon the mortgagee.²

Moreover, an assignment made to secure a preëxisting debt does not give the assignee the position of a purchaser for value, and entitle him to hold the mortgage free of the equities to which his assignor was subject; but in such case, although he takes the note before maturity, he takes it subject to such equities.³

The fact that instalments of interest are overdue and unpaid upon a mortgage note at the time of its assignment, or that the note is indorsed without recourse, does not affect the rights of the assignee as a *bond fide* holder.⁴ Mere circumstances of suspicion of infirmity in the title to the note, or knowledge of facts that

¹ Fish v. French, 15 Gray (Mass.), 520; Howard v. Gresham, 27 Ga. 347; Reddish v. Ritchie, 17 Fla. 867; Sharts v. Awalt, 73 Ind. 304.

² Eversole v. Maull, 50 Md. 95.

³ Glidden v. Hunt, 24 Pick. (Mass.) 221; Clark v. Flint, 22 Pick. (Mass.) 231.

⁴ Kelley v. Whitney, 45 Wis. 110; S. C. 7 Reporter, 126; 19 Alb. L. J. 130; and see Cromwell v. County of Sac, 96 U. S. 51; National Bank v. Kirby, 108 Mass. 497; Jones on Railroad Securities, § 199.

would excite suspicion in the mind of a prudent man, if there is no bad faith, does not affect the rights of a purchaser.¹

A mortgage given to indemnify the mortgagee against loss as a surety upon a note is not negotiable under the law merchant, for the mortgage in such case is not an incident to the note, and does not as such pass with it to a third person. The assignee of such a mortgage takes it subject to the equities between the mortgagor and mortgagee, and with no other rights than his assignor had.²

842. A bond not being a negotiable instrument is subject when assigned to all equities existing between the original parties to it; and of course is subject to such equities when assigned with the mortgage, which is collateral to it.³ The rule, that the assignee of a mortgage before maturity takes it free from existing equities, applies only to such mortgages as are collateral to negotiable notes.⁴

Therefore, any defence to which the bond and mortgage were subject in the hands of the mortgagee may still be made after they have been transferred to another for value. Fraud and duress in procuring the execution of the bond is a defence to the

¹ *Kelley v. Whitney*, 45 Wis. 110; *Jones on Railroad Securities*, § 207.

² *Corbett v. Woodward*, 5 Sawyer, 403.

³ This is the form of obligation chiefly used in connection with mortgages in New York; and the early practice in Massachusetts was to give a bond rather than a negotiable note for the mortgage debt. In *Crane v. March*, 4 Pick. 131, before the Supreme Court of the latter state, Parker, C. J., referring to the equities of the holder of a negotiable note secured by mortgage, said: "In the form usually practised in regard to mortgages, until lately, these difficulties could not occur, for the collateral security was a bond, which, not being assignable at law, the action upon it would be always in the name of the obligee, and the assignee in equity could avail himself of no means of enforcing payment from which the obligee would be restricted." See remarks by Lord, J., in *Strong v. Jackson*, 123 Mass. 60, 63.

⁴ *Wisconsin*: *Croft v. Bunster*, 9 Wis. 503; *Goulding v. Bunster*, 9 Wis. 513; *New Jersey*: *Musgrove v. Kennell*, 23 N.

J. Eq. 75; *Losey v. Simpson*, 11 N. J. Eq. 246; *Vredenburg v. Burnet*, 31 N. J. Eq. 229; *Tabor v. Fox* (Iowa, 1881), 9 N. W. Rep. 897; *Dunn v. Seymour*, 1b. 278; *Andrews v. Torrey*, 14 N. J. Eq. 355; *Cornish v. Bryan*, 10 N. J. Eq. 146. *New York*: *Crane v. Turner*, 67 N. Y. 437; *Union College v. Wheeler*, 61 N. Y. 88, 107; *Ingraham v. Disborough*, 47 N. Y. 421; *Rice v. Dewey*, 54 Barb. 455; *Clute v. Robison*, 2 Johns. 595; *Bank of Niagara v. Roosevelt*, 9 Cow. 409; *S. C. Hopk. 579*; *Ellis v. Messervie*, 11 Paige, 467; *S. C. Evans v. Ellis*, 5 Denio, 640; *Pendleton v. Fay*, 2 Paige, 202; *James v. Morey*, 2 Cow. 246; *Hartley v. Tatham*, 10 Bosw. 273; *Bank for Savings in N. Y. v. Frank*, 45 Superior Ct. 404; *Wanzer v. Cary*, 76 N. Y. 526. *Michigan*: *Reeves v. Scully*, Walk. 248; *Russell v. Waite*, Walk. 31; *Nichols v. Lee*, 10 Mich. 526. *Pennsylvania*: affirming 12 Hun, 403; *Mott v. Clark*, 9 Pa. St. 399; *Pryor v. Wood*, 31 Pa. St. 142; *Twitchell v. McMurtrie*, 77 Pa. St. 383; *Horstman v. Gerker*, 49 Pa. St. 282.

mortgage in the hands of an assignee.¹ The consideration may be impeached. Claims in set-off, which the mortgagor might interpose against the mortgagee, he may set up against the mortgage in the hands of the assignee. The assignee takes only the title that the mortgagee had. The bond is a mere chose in action, and the mortgage is a chose in action also. Neither instrument having any negotiable character, the mortgagor's rights in respect to the obligation are not changed in any way by a transfer of the mortgage.² "A purchaser of a chose in action," says Lord Thurlow,³ "must always abide by the case of the person from whom he buys; that I take to be a universal rule." Aside from negotiable paper, which under the commercial law has peculiar privileges, the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. His capacity to transfer to another is exactly measured by his own rights. Except as the codes of practice and special statutes in some states have changed the rule, an action by the assignee to enforce his rights must be in the name of the assignor. Therefore, "every assignment of a chose in action is considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession."⁴

An assignee who takes a mortgage and bond with actual or constructive notice of the equities of third persons takes them subject to such equities.⁵

In Pennsylvania the right of an obligor to defend against an assignee of the bond and mortgage is limited to matters affecting the existence of the debt, to want of consideration, and to claims in set-off. The mortgagor cannot assert against an assignee of the mortgage and bond a secret equity; or an agreement with the obligee merely collateral; or an agreement inconsistent with the purport or legal effect of the instruments.⁶ Thus, for instance,

¹ *Martineau v. McCollum*, 4 Chand. (Wis.) 153.

² *New York*: *Davis v. Bechstein*, 69 N. Y. 440; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Ingraham v. Disborough*, 47 N. Y. 421; *Reeves v. Kimball*, 40 N. Y. 299; *Mason v. Lord*, 40 N. Y. 476; *Bush v. Lathrop*, 22 N. Y. 535; *Mickles v. Townsend*, 18 N. Y. 575; *Richards v. Warring*, 1 Keyes, 576; *Ely v. McNight*, 30 How. Pr. 97; *Westfall v.*

Jones, 23 Barb. 9. *Maryland*: *Hardesty v. Jones*, 10 G. & J. 404, 420; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598.

³ *Davies v. Austen*, 1 Ves. Jun. 247.

⁴ 2 Story Eq. Jur. § 1040.

⁵ *Hovey v. Hill*, 3 Lana. (N. Y.) 167; *Mathews v. Heyward*, 2 S. C. 239; *Godeffroy v. Caldwell*, 2 Cal. 489.

⁶ *Davis v. Barr*, 9 S. & R. 137, 141; *Commonwealth v. Councils of Pittsburgh*, 34 Pa. St. 496, 520; *Pryor v. Wood*, 81 Pa. St. 142.

the assignee is not affected by a collateral agreement between the mortgagor and mortgagee, made at the time of the execution of the mortgage, of which he had no notice, that the mortgagee should release the lien of the mortgage from any lots included in the mortgage which the mortgagor might sell on receiving a reasonable amount of the purchase money;¹ moreover, when a mortgage and bond have been made for the purpose of enabling the mortgagor to raise money, the purchaser is not affected by any want of consideration or defence the mortgagor had against the mortgagee; for otherwise the mortgagor would be enabled to perpetrate a fraud, and to use that fraud to his own advantage.²

The owner of an equity of redemption having made a partial payment upon a bond and mortgage gave to the mortgagee his negotiable note for the remainder due upon the mortgage, and several times renewed it with the understanding that the mortgagee should continue to hold the mortgage. The latter, however, assigned the note to one person and the bond and mortgage to another who had no knowledge of the mortgagee's collateral agreement about the note. It was held that the assignee should be protected, and that the loss should fall upon the maker of the note, who by his negligence had put it in the power of the mortgagee to cause the loss.³

843. Whether the rule is limited to equities between the original parties is a question upon which different courts are not in accord. On the one hand, the rule that the assignee of a bond and mortgage, which are merely choses in action, takes them subject to existing equities, is limited in its application to such equities only as existed between the mortgagor and mortgagee, and is not extended to those existing between the mortgagee and third persons.⁴ The reason for this limitation seems a strong one. "The assignee," says Chancellor Kent,⁵ "can always go to the debtor, and ascertain what claims he may have against the bond, or other chose in action, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence,

¹ *McMasters v. Wilhelm*, 85 Pa. St. 218.

² *Per Strong, J.*, in *Commonwealth v. Councils of Pittsburgh*, 34 Pa. St. 496, 520.

³ *Jeffers v. Gill*, 91 Pa. St. 290.

⁴ *New Jersey*: *De Witt v. Van Sickle*, 29 N. J. Eq. 209; *Putnam v. Clark*, 29 N. J. Eq. 412; *Starr v. Haskins*, 26 N.

J. Eq. 415; *Lozey v. Simpson*, 11 N. J. Eq. 246; *Woodruff v. Depue*, 14 N. J. Eq. 168; *Vredenburg v. Burnet*, 31 N. J. Eq. 229. *Pennsylvania*: *Porter v. King* (D. C. Pa. 1880), 1 Fed. Rep. 755; *Mott v. Clark*, 9 Pa. St. 399; *Pryor v. Wood*, 31 Pa. St. 142.

⁵ *Murray v. Lyburn*, 2 Johns. (N. Y.) Ch. 441.

to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and for this reason the claim of the assignee, without notice of a chose in action, was preferred, in the late case of *Redfearn v. Ferrier*,¹ to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case, that if it were not to be so no assignments could ever be taken with safety."

844. But the settled rule in New York is that the assignee is affected by equities in favor of third persons, in the same manner that he is affected by equities existing against him in favor of the mortgagor. This question has been frequently discussed in recent cases in that state. In the case of *Bush v. Lathrop*,² Mr. Justice Denio, after examining numerous authorities, came to the conclusion that the supposed distinction between

¹ 1 Dow, 50.

² 22 N. Y. 535. In *Union College v. Wheeler*, 61 N. Y. 88, 104, Mr. Commissioner Dwight reviewed the subject: "Is, then, the plaintiff in any better position than Nott, the mortgagee? It is well settled that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee cannot himself enforce it, the assignee has no greater rights. The true test is to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged: what he can do the assignee can do, and no more. In *Clute v. Robison*, 2 Johns. 595, 612, the rule, as stated by Kent, Ch. J., is, that a mortgage is liable to the same equity in the hands of the assignee that existed against it in the hands of the obligee. 2 Vern. 692, 765; 1 Ves. 122. The rule is not simply that the assignee takes subject to the equities between the original parties, though that is sound law. *Ingraham v. Disborough*, 47 N. Y. 421. It goes further than this, and declares that the purchaser in a chose in action must always abide the case of the person from whom he buys. Per Lord Thurlow, in *Davies v. Austen*, 1 Ves. Jun. 247. The reason of the rule is, that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of

power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights. *Beebe v. Bank of New York*, 1 Johns. (N. Y.) 529, 552, per Spencer, J., and 549, per Tompkins, J. Kent, Ch. J., in a dissenting opinion in the same case, would have confined the rule to the equities between the original parties to the contract. *Ib.* 529, 573. The opinions of Spencer and Tompkins, JJ., were, however, recognized as the correct exposition of the law in *Bush v. Lathrop*. A considerable number of authorities are cited by the plaintiff as tending to show that the assignee of a chose in action is only subject to the equities between the contractor (the assignor) and the debtor, and not to the so-called latent equities of third persons. Such cases as *James v. Morey*, 2 Cow. 246; *Bloomer v. Henderson*, 8 Mich. 395; *Mott v. Clark*, 9 Pa. St. 399, and others of the same class, were reviewed as to their principle or specifically in *Bush v. Lathrop*, and repudiated. The doctrine of Lord Thurlow, in England, and of Spencer and Tompkins, JJ., already considered, was thus adopted, rather than that of Kent, Ch. J. The law of some of the other states undoubtedly coincides with the view of Kent, but, since the decision of *Bush v. Lathrop*, must be regarded as without authority here."

these equities is without foundation, and that the assignee takes the security subject to all the equities that third persons could enforce against the assignor, as well as subject to those existing between the parties to the instrument. In that case the holder of the mortgage and bond assigned them by an absolute and unconditional bond, as security for a debt for a much smaller sum than that due upon the mortgage, and his assignee transferred the mortgage for full value to a third person without notice of this fact. The rule above stated as to the equities of third persons was applied to the case, and it was held that the subsequent assignee took the security subject to the equity of the former holder of the mortgage, to redeem it upon payment of the amount of the debt for which he had pledged it.

844 a. The doctrine of estoppel may come in to qualify the application of this rule. Thus in the case last named the application of this rule to the facts presented was overruled by the case of *Moore v. Metropolitan National Bank*;¹ although the rule there stated as to the equities of third persons was not questioned. The latter case held that where the holder of a non-negotiable chose in action has conferred the apparent absolute ownership of it upon another by assignment, one who purchases from such assignee in good faith for value, relying upon the faith of such apparent ownership, obtains a valid title as against the first assignor, who is estopped from asserting a title in hostility to such apparent ownership. The decision is based altogether upon the doctrine of estoppel. The owner of the security, having conferred apparent ownership upon his assignee and apparent authority to convey, is estopped as against a *bond fide* purchaser to deny that ownership or that authority. Applying this rule of estoppel to the facts of the case presented in *Bush v. Lathrop*, the owner of the mortgage and bond having assigned them absolutely, and conferred upon his assignee apparent absolute authority over the securities, would be estopped from asserting his title to them against one who had purchased upon the faith of the assignee's apparent authority to sell.

If a mortgage which purports upon its face to be founded upon a valuable consideration contains no reference to a condition or agreement upon which it was given, that it should be sold and the proceeds applied to the payment of certain drafts accepted by the mortgagee for the mortgagor's accommodation, though the

¹ 55 N. Y. 41.

mortgage secures a non-negotiable bond, the mortgagor is estopped from disputing the title of one who purchased the mortgage in good faith without knowledge of such agreement, and the holder of the drafts cannot insist that the moneys arising from the sale of the mortgage shall be applied to the payment of the drafts.¹

In a similar case in New Jersey, a mortgagee, having placed an assignment in the hands of an agent in such a way as to enable him to dispose of the mortgage for his own benefit, was held to be estopped to claim the mortgage as against a *bond fide* assignee.²

But aside from the doctrine of estoppel, the rule above stated as to the equities of third persons has been several times approved in recent cases before the Court of Appeals of New York; and the general doctrine is there well established, that one who takes an assignment of a bond and mortgage takes them subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the latent equities in favor of third persons.³

845. This doctrine was recently approved in *Greene v. Warnick*, by the Court of Appeals of New York.⁴ It appeared that two mortgages for equal sums were executed at the same time upon the same real estate, to different persons, to secure the purchase money for the same. It was understood and agreed between the mortgagees, at the time of the delivery of the mortgages, that they should be equal liens in all respects upon the premises. They were both recorded the same day, but one fifteen minutes before the other. The mortgage first recorded was assigned to a *bond fide* purchaser for value without notice of the agreement. It was held that the assignee took subject to the equities between the mortgagees, and could claim no priority of lien by reason that his mortgage was first recorded. The rule, that an assignee of a bond and mortgage takes them not only subject to all the equities existing between the parties to the in-

¹ First Nat. Bank of Corry v. Stiles, 22 Hun (N.Y.), 339.

² Putnam v. Clark, 29 N. J. Eq. 412; Grocers' Bank v. Neet, 29 N. J. Eq. 449. Latent equities in favor of third persons are not, however, recognized in this state. § 843.

³ Greene v. Warnick, 64 N. Y. 220; Viele v. Judson, 82 N. Y. 32; Bank for Savings in N. Y. v. Frank, 45 N. Y. Su-

perior Ct. 404; Union College v. Wheeler, 61 N. Y. 88; Schafer v. Reilly, 50 N. Y. 61. Mr. Justice Allen, in the latter case, says the rule as stated by Judge Denio, in *Bush v. Lathrop*, "commends itself as a just exposition of the law, as well upon principle as upon authority."

⁴ 64 N. Y. 220, reversing S. C. 4 Hun, 703.

WHETHER ASSIGNEE TAKES SUBJECT TO EQUITIES. [§§ 846, 847.

strument, but to the equities which third persons could enforce against the assignor, was fully approved and adopted. The case differed from that of *Moore v. Metropolitan National Bank* in the fact that the doctrine of estoppel could not apply; for the holder of the mortgage last recorded had done nothing to induce the assignee to purchase the other mortgage, and had not by any act or omission misled him. Estoppel can only operate against the party whose act created it, and cannot affect the rights or equities of other persons.

846. A parol trust may attach to a mortgage, that the mortgagee shall hold it in part for his own benefit and in part for the benefit of another. If such an agreement be made at the time of giving a mortgage between the parties to it and another to whom the mortgagor was indebted, also providing that upon the payment of the mortgage it should be transferred to this latter creditor as security for the debt owing him, the assignment to him, after the payment of the mortgage debt to the mortgagee, will be valid and effectual, so as to enable such assignee to foreclose the mortgage. Such an arrangement is not an attempt to tack or graft upon a mortgage duly executed under the hand and seal of the mortgagor a parol mortgage for a further sum.¹

847. The assignee is not affected by equities arising after the assignment, and which had no existence, and were simply possibilities at the time of the assignment.² Even a fraud committed by the assignor after the assignment cannot affect the rights of the assignee.³

¹ *Hubbell v. Blakeslee*, 71 N. Y. 63, reversing 8 Hun (N. Y.), 603.

² *Elliott v. Deason*, 64 Ga. 63; *Colehour v. State Sav. Inst.* 90 Ill. 152.

³ *Bush v. Cushman*, 27 N. J. Eq. 131;

Cornish v. Bryan, 10 N. J. Eq. (2 Stockt.) 146; *Coster v. Griswold*, 4 Edw. (N. Y.) 364, 374; *Murray v. Lylburn*, 2 Johns. (N. Y.) Ch. 442.

CHAPTER XX.

MERGER AND SUBROGATION.

PART I.

Merger, 848-873.

PART II.

Subrogation, 874-885.

PART I.

MERGER.

848. Merger at law and in equity.—In law a merger always takes place when a greater estate and a less coincide and meet in one and the same person, in one and the same right, without any intermediate estate. The lesser estate is annihilated or merged in the greater. But “upon this subject,” says Sir William Grant,¹ “a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law; and sometimes preserve it when at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united.”² This intention is a question of fact, and is to be tried and determined in the same manner as are other issues. It comes in to repel the *prima facie* presumption of merger which arises from the union of the legal and equitable estates in the same person at the same time. His intention is generally determined by his interest, though all the attending circumstances are to be considered.³

¹ *Forbes v. Moffatt*, 18 Ves. 384.

² In England, since Nov. 1, 1875, no merger takes place by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged in equity. Sup. Ct. of Judicature, Act 1873, c. 66, § 25; Act 1874 c. 83, § 2.

³ *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 167, 173. *Massachusetts*: *Gibson v. Crehore*, 3 Pick. 475; *Hunt v. Hunt*, 14 Ib. 374; *Tuttle v. Brown*, Ib. 514; *Loud v. Lane*, 8 Met. 517; *Grover*

v. Thatcher, 4 Gray, 526; *Evans v. Kimball*, 1 Allen, 240. *Pennsylvania*: *Wallace v. Blair*, 1 Grant Cas. 75; *Duncan v. Drury*, 9 Pa. St. 332. *Vermont*: *Marshall v. Wood*, 5 Vt. 250, 254; *Walker v. Baxter*, 26 Vt. 710; *Myers v. Brownell*, 1 D. Chip. 448; *Slocum v. Catlin*, 22 Vt. 137; *Bullard v. Leach*, 27 Vt. 491; *Downer v. Fox*, 20 Vt. 388. *New Hampshire*: *Robinson v. Leavitt*, 7 N. H. 73; *Bailey v. Willard*, 8 N. H. 429; *Hutchins v. Carleton*, 19 N. H. 487, 489; *Weld v. Sabin*, 20 N. H. 533; *Johnson v. Elliott*, 26 N.

It is a general rule that when the legal title becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged by the unity of possession. But if the owner has an interest in keeping these titles distinct, or if there be an intervening right between the mortgage and the equity, there is no merger.¹ Thus, where the purchaser of the equity of redemption of premises already subject to a mortgage made a second mortgage, and while this was outstanding took an assignment of the first mortgage, which he afterwards assigned to a third person, it was held that the first mortgage was not extinguished, but that the second mortgage outstanding prevented a merger.²

To effect a merger at law, the right previously held, and the right subsequently acquired, must coalesce in the same person and in the same right, without any other right intervening.³ "In fact," says Chief Justice Bellows of New Hampshire, in a recent case,⁴ "the doctrine of merger springs from the fact that when

- H. 67, 69; *Heath v. West*, 26 N. H. 191; *Bell v. Woodward*, 34 N. H. 90; *Drew v. Rust*, 36 N. H. 335; *Wilson v. Kimball*, 27 N. H. 300; *Moore v. Beasom*, 44 N. H. 215; *Hinds v. Ballou*, 44 N. H. 619, 620; *Stantons v. Thompson*, 49 N. H. 272. **New Jersey**: *Hinchman v. Emans*, 1 N. J. Eq. (Sax.) 100; *Van Wagenen v. Brown*, 26 N. J. L. 196; *Den v. Vanness*, 10 N. J. L. (5 Halst.) 102; *Duncan v. Smith*, 31 N. J. L. 325. **New York**: *Millsbaugh v. McBride*, 7 Paige, 509; *Skell v. Spraker*, 8 Ib. 182; *White v. Knapp*, 8 Ib. 173; *Judd v. Seekins*, 62 N. Y. 266; *Spencer v. Ayrault*, 10 N. Y. 202; *Clift v. White*, 12 N. Y. 519; *Bascom v. Smith*, 34 N. Y. 320; *Sheldon v. Edwards*, 35 N. Y. 279; *Day v. Mooney*, 4 Hun, 134; *Angel v. Boner*, 38 Barb. 425; *Vanderkemp v. Shelton*, 11 Paige, 28; *James v. Johnson*, 6 Johns. Ch. 417, 423; *Starr v. Ellis*, Ib. 393; *Gardner v. Astor*, 3 Ib. 53; *James v. Morey*, 2 Cow. 246, 285; *McGiven v. Wheelock*, 7 Barb. 22, 29; *Champney v. Coope*, 34 Ib. 539; *Kellogg v. Ames*, 41 Ib. 218; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135, 157; *Hancock v. Hancock*, 22 N. Y. 568; *Franklyn v. Hayward*, 61 How. Pr. 43. **Maine**: *Given v. Marr*, 27 Me. 212; *Holden v. Pike*, 24 Me. 427; *Hatch v. Kimball*, 14 Me. 9; *Simonton v. Gray*, 34 Me. 50; *Hatch v. Kimball*, 16 Me. 146. **Connecticut**: *Baldwin v. Norton*, 2 Conn. 161; *Lockwood v. Sturdevant*, 6 Conn. 373, 387; *Mallory v. Hitchcock*, 29 Conn. 127; *Bassett v. Mason*, 18 Conn. 131; *Hart v. Chase*, 46 Conn. 207. **Illinois**: *Edgerton v. Young*, 43 Ill. 464; *Richardson v. Hockenbush*, 85 Ill. 124. **Iowa**: *Lyon v. McIlvaine*, 24 Iowa, 9; *White v. Hampton*, 13 Iowa, 259; *Shimer v. Hammond*, 51 Iowa, 401. **Other States**: *Davis v. Pierce*, 10 Minn. 376; *Snyder v. Snyder*, 6 Mich. 470; *Carter v. Taylor*, 3 Head (Tenn.), 30; *Grellet v. Heilshorn*, 4 Nev. 526; *Brooks v. Rice*, 56 Cal. 428.
- ¹ *Hancock v. Hancock*, 22 N. Y. 568; *Hill v. Pixley*, 63 Barb. (N. Y.) 200; *Loud v. Lané*, 8 Met. (Mass.) 517; *Grellet v. Heilshorn*, 4 Nev. 526; *Lyon v. McIlvaine*, 24 Iowa, 9; *Wihelmi v. Leonard*, 13 Ib. 330; *Warren v. Warren*, 30 Vt. 530; *Ætna L. Ins. Co. v. Corn*, 89 Ill. 170; *Campbell v. Carter*, 14 Ill. 286; *Jarvis v. Frink*, 14 Ill. 396.
- ² *Evans v. Kimball*, 1 Allen (Mass.), 240.
- ³ *Hunt v. Hunt*, 14 Pick. (Mass.) 384, per Shaw, C. J.; *Lockwood v. Sturdevant*, 6 Conn. 373, 387, per Hosmer, C. J.
- ⁴ *Stantons v. Thompson*, 49 N. H. 272.

the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seised in fee simple; but if there is an outstanding, intervening title, the foundation for the merger does not exist, and as matter of law it is so declared."

An intervening incumbrance of any kind is generally sufficient to prevent a merger of the mortgage with the equity of redemption, provided the incumbrance be not one which the owner has assumed to pay, or one against which he is estopped from defending, whether such incumbrance be an attachment,¹ a levy of execution,² another mortgage,³ or any other lien.

No merger occurs when the mortgagee purchases the equity of redemption at an execution sale, so long as the debtor's right to redeem from such sale continues.⁴

849. An assignment of a mortgage to one of two tenants in common of the equity of redemption does not discharge it. His own interest in the equity does not prevent his holding under the higher title. The co-tenant is not prejudiced, for he may redeem by payment of his proportion of the debt.⁵

Where one who has purchased part of the premises subject to a mortgage takes an assignment of the mortgage, although it may operate as a merger in respect to the part of the premises bought by him, it will not have this operation in respect to the part not bought.⁶ Nor is there any merger when a mortgagee becomes a devisee of an undivided half of the premises.⁷

When the owner of an equity of redemption by will or otherwise takes an undivided interest in the mortgage debt, as a tenant in common with others, no merger of his interest takes place. The owner of any part of a mortgage has the whole premises for his security. His mortgage cannot be extinguished as to any part or interest in the land, whether divided or undivided, without his assent. The fact that some one else has a legal interest or share in the security prevents the blending of the interests in

¹ *Grover v. Thatcher*, 4 Gray (Mass.), 526.

² *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.), 390; *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

³ *Bell v. Woodward*, 34 N. H. 90; *Dutton v. Ives*, 5 Mich. 515.

⁴ *Southworth v. Scofield*, 51 N. Y. 513.

⁵ *Barker v. Flood*, 103 Mass. 474.

⁶ *Wilhelmi v. Leonard*, 13 Iowa, 330; *King v. McVickar*, 3 Sandf. (N. Y.) Ch. 192; *Casey v. Buttolph*, 12 Barb. (N. Y.) 637; *Pike v. Goodnow*, 12 Allen (Mass.), 472.

⁷ *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

such case.¹ And so, on the other hand, there is no merger when a mortgagee of the entire premises becomes a devisee of an undivided part of the equity of redemption. He is entitled to be protected by holding his entire mortgage against the entire premises.²

850. The assignment of a mortgage to the wife of the mortgagor operated at common law as a discharge of it. But under the statutes not in force in all or nearly all our states, authorizing married women to buy and sell real estate, such an assignment would not operate as a discharge.³

A husband may purchase and hold a mortgage given by his wife upon her property, in which he has also joined. It is not merged by an assignment to him. Much less is it satisfied in the hands of another person to whom it is assigned upon the payment of the consideration by the husband.⁴

851. The marriage of a single woman who holds a mortgage with the mortgagor does not extinguish the mortgage lien or the debt, under the statutes in regard to the rights of married women in their separate property now generally in force.⁵

Neither does the execution by the husband and wife after marriage, of a mortgage upon the same premises to a third person, discharge the lien of the wife's mortgage against her husband, if she uses no words of release to operate upon her mortgage, and it is apparent from the instrument that she joined merely to release her inchoate right of dower.⁶

852. In case the equitable estate has been in any way extinguished the doctrine of merger has no application. Thus, where a mortgagee allowed the mortgaged premises to be sold under a prior judgment, and failed to redeem within the time allowed, but afterwards obtained a conveyance of the premises from the purchaser under execution sale, his mortgage title was wholly gone, and there was nothing to merge in the legal estate. Neither could his purchase have the effect in any way to revive his mortgage as a lien, and enable him to transfer it to another.⁷

853 After the owner of lands has taken an assignment of

¹ *Clark v. Clark*, 56 N. H. 105.

² *Sahler v. Signer*, 44 Barb. (N. Y.) 606.

³ *Bean v. Boothby*, 57 Me. 295; *Bemis v. Call*, 10 Allen (Mass.), 512; *Model Lodging House Ass'n v. Boston*, 114 Mass. 133.

⁴ *Faulks v. Dimock*, 27 N. J. Eq. 65.

⁵ *Power v. Lester*, 23 N. Y. 527.

⁶ *Power v. Lester*, *supra*; *S. C.* 17 How. Pr. 413; *Gillig v. Maass*, 28 N. Y. 191.

⁷ *Hill v. Pixley*, 63 Barb. (N. Y.) 200.

the mortgage to himself, and then assigned it to another as a valid security, he is estopped from insisting, as against the assignee or any one claiming under him, that it had merged in the equity of redemption.¹ It is immaterial in such case that the remedy at law upon the note which accompanied the mortgage was barred: that does not affect the validity of the mortgage or the remedy upon it. It is immaterial, too, that the person who claims the benefits of a merger is a purchaser from the former owner by a deed made after the assignment of the mortgage by his grantor was recorded; for then the same record which informed him of the facts, which at common law would constitute a merger, also notified him of the assignment which created the estoppel.² If he has purchased by deed of warranty he may have a remedy upon the covenants, but he cannot resist the foreclosure of the mortgage.³

854. By selling the estate free from incumbrances, he may be estopped on the other hand, as against the purchaser at least, from saying that there was no merger.⁴ A mortgagee having purchased the equity of redemption while it was subject to a second mortgage, afterwards sold the land to a third person for a price sufficient to pay both mortgages, as well as the sum paid for the equity of redemption. Although his prior lien was not merged by his purchase, it was regarded as satisfied by his sale, so that on a subsequent foreclosure of the second mortgage the proceeds were first applied to the payment of the second mortgage.⁵

855. The intention of the parties at the time of the payment of the mortgage determines the effect of such payment. If it is clear that there was then no intention on the part of the person making the payment, either actual or to be implied from the condition of things then existing, to keep the mortgage alive, it cannot afterwards, upon a change of his intention, or upon a change in the surrounding circumstances, be regarded as a subsist-

¹ *Powell v. Smith*, 30 Mich. 451; *Kellogg v. Ames*, 41 N. Y. 259, reversing 41 Barb. 218; *Skeel v. Spraker*, 8 Paige (N. Y.), 182.

² *Powell v. Smith*, *supra*.

³ *Kellogg v. Ames*, *supra*. The court, Murray, J., delivering the opinion, says, that the purchaser takes the deed with constructive notice of the existence of the

mortgage. It is upon record. He then steps into the former owner's place; he takes his interest and his rights in the land, and no more; the estoppel which was controlling the former owner is also controlling him.

⁴ *Bulkeley v. Hope*, 1 Kay & J. 482; 1 Jur. N. S. 864.

⁵ *Webb v. Meloy*, 32 Wis. 319.

ing security.¹ Thus, where a mortgage was paid without an assignment or discharge of it being then made, and no agreement was made for any future assignment of it, and the owner of the estate eighteen years afterwards conveyed the land by warranty, and his grantee obtained an assignment of the mortgage to the first purchaser, it was held that nothing passed because the mortgage had already been discharged by the payment.²

856. The question, whether there is a merger in a particular case, depends not so much upon the kind or form of instrument by which one estate is transferred to the holder of the other as upon the intention of the parties, and if the intention be declared in such instrument it may control the construction of its effect. But even as against the expressed intention, that which is inferred from the relation of the parties to each other and to others, or from their own interests, may be sufficient to control the construction, especially if the expressions of intention be vague or doubtful.

A recital in a deed from a mortgagor to his mortgagee of the mortgaged land, that the deed was made to cancel the mortgage, may conclude the grantee from denying that fact, so far as the intention was concerned; but the mortgage and the notes remaining in his possession by agreement, he may rely upon his mortgage title as against an intervening attachment.³ Where the upholding of a separate mortgage title is essential to the interests of the owner, a reference in a deed to the mortgage as "having been cancelled by assignment" will not effect a merger.⁴

On the other hand, when a conveyance to a mortgagee is made expressly subject to a right of dower, whereby the intention of the parties is manifest that such a right should be preserved, the purchaser will not be allowed to set up the mortgage as a subsisting title against this right.⁵

When a person holding an equity of redemption, by a conveyance fraudulent as against the grantor's creditors, takes from the mortgagee a quitclaim deed of all his interest in the premises,

¹ *Champney v. Coope*, 34 Barb. (N. Y.) 539; *Loomer v. Wheelwright*, 3 Sandf. (N. Y.) Ch. 135, 157; *Gardner v. Astor*, 3 Johns. (N. Y.) Ch. 53; *Cole v. Edgerly*, 48 Me. 108; *Aiken v. Milwaukee & St. P. R. R. Co.* 37 Wis. 469; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 383; *Gayle v. Wil-*

son, 30 Gratt. (Va.) 166; S. C. 5 Reporter, 667.

² *Given v. Marr*, 27 Me. 212.

³ *Crosby v. Chase*, 17 Me. 369.

⁴ *Bean v. Boothby*, 57 Me. 295.

⁵ *Campbell v. Knights*, 24 Me. 332.

containing this clause: "Which said mortgage is hereby cancelled and discharged, the said" grantor "having recently conveyed his interest in the premises to" the grantee, this amounts to an assignment, and not a merger, of the mortgage, if the creditors interfere and take the equity.¹

When one erroneously supposing that he owned the equity of redemption of land subject to two mortgages paid to the first mortgagee the amount due on his mortgage, and took a deed in which the mortgagee released, granted, and sold his interest in the land, "meaning hereby to release all the right I have in the premises by virtue of said mortgage, the aforesaid sum having been this day paid me in discharge of said mortgage," this deed was held to operate as a grant of the legal estate, or a satisfied mortgage, and not as an assignment of the debt. The purpose of the mortgagee in making the deed was to be taken into consideration in construing it, and this purpose was to acknowledge payment of the debt and to pass the legal estate. This explanation of the intent of the parties avoids the inference that might be made from the other parts of the deed, that the debt was thereby assigned. Without this evidence of payment, the fact that it was paid and not assigned might be proved by parol.²

If the owner of land subject to two mortgages duly recorded, who is under no obligation to pay either of them, in ignorance of the second mortgage makes a part payment on the first mortgage for the purpose of perfecting his title, and afterwards, on being informed of the second mortgage, pays the balance due on the first, and causes that mortgage to be assigned to a third person in trust for himself, the holder of the second mortgage is not entitled to redeem the first except by paying the full amount thereof.³

857. Merger may be prevented by an expressed intention to the contrary, contained in a deed of release from the owner of the equity of redemption to the holder of the mortgage,⁴ that the deed shall not operate as a merger of title, except at the election of the grantee; in which case there will be no merger,

¹ Crosby v. Taylor, 15 Gray (Mass.), 64.

² Wade v. Howard, 11 Pick. (Mass.) 289; S. C. 6 Ib. 492.

³ Ryer v. Gass, 130 Mass. 227. See, also, Franklyn v. Hayward, 61 How. (N. Y.) Pr. 43.

⁴ Bailey v. Richardson, 9 Hare, 734; and see Tyrwhitt v. Tyrwhitt, 32 Beav. 244; Wilkes v. Collin, L. R. 8 Eq. 338; Ætna Life Ins. Co. v. Corn, 89 Ill. 170; S. C. 11 Chicago L. N. 88.

unless evidence tending to show such election on his part be given.¹ An assignment of the mortgage paid off might be taken to a trustee with an express declaration that the object was to preserve the priority of the lien;² but the conveyance alone without the declaration is not regarded as conclusive.³

When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore if the estate be subject to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it, and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his intention was to preserve the mortgage rather than to extinguish it.⁴

858. Whether the release of a mortgage constitutes a discharge or an assignment depends not so much upon the form of the instrument as upon the relations of the parties to the estate, and their presumed intent derived from the circumstances under which the conveyance is made.⁵ If the release is to a party whose duty it is to extinguish the mortgage for the benefit of another, it will be held to operate as a discharge.⁶ If the money be paid by one who has assumed the duty of paying the debt, either by contract with the mortgagor or with those who may have succeeded to his rights, this must be taken, as regards other subsequent interests, as a payment; consequently, when one has purchased land by a deed containing an express stipulation that he shall assume and pay an existing mortgage debt upon it, his payment of it operates as a discharge of the mortgage, whether he takes an assignment of the mortgage, an acknowledgment of payment, or a release.⁷

859. A deed of quitclaim from the mortgagee to a third person, who pays the amount due upon a mortgage at the request or with the consent of the mortgagor, operates generally

¹ *Spencer v. Ayrault*, 10 N. Y. 202.

² *Bailey v. Richardson*, 9 Hare, 734.

³ *Hood v. Phillips*, 3 Beav. 613; *Parry v. Wright*, 1 Sim. & St. 369; and see *Gunter v. Günter*, 23 Beav. 571.

⁴ *Clarendon v. Barham*, 1 Y. & C. C. 688; *Davis v. Barrett*, 14 Beav. 542; *Hatch v. Skelton*, 20 Beav. 453; *Denzler v. O'Keefe*, 34 N. J. Eq. 361.

⁵ *Ryer v. Gass*, 130 Mass. 227, per Ames, J.

⁶ *Wadsworth v. Williams*, 100 Mass. 126. See *Wade v. Beldmeir*, 40 Mo. 486; *Burnham v. Dorr*, 72 Me. 198.

⁷ *Kilborn v. Robbins*, 8 Allen (Mass.), 466. See, however, *Young v. Morgan*, 89 Ill. 199.

as an assignment, and not as an extinguishment of the mortgage,¹ unless the latter effect be intended. But a quitclaim deed by the holder of the mortgage, whether the original mortgagee or his assignee, to the owner of the equity of redemption, generally operates to discharge the mortgage, unless there be a good reason why it should not have this effect.²

860. A bequest of the mortgage to the mortgagor would generally merge the lien. But if the interest of the mortgage be given to another for life, and the principal of it to the mortgagor afterwards, the mortgage is kept alive and may be foreclosed during the lifetime of the person entitled to the interest.³ But where a mortgagee conveyed the mortgaged premises to the mortgagor in trust for the separate use of his wife during her life, remainder over to her children, and the mortgagor expressly covenanted that he would accept the trust and carry it into effect, it was held that upon the death of the mortgagor the trust terminated, and the entire legal and equitable estate devolved upon the remaindermen, the equitable estate of the mortgagor having merged in the legal estate conveyed to him.⁴

861. Parol evidence that an assignment of a mortgage was intended to be a discharge is admissible only for the purpose of proving fraud.⁵ The legal effect of a conveyance cannot be changed by parol evidence.⁶ Yet such evidence is admissible to show the consideration upon which the conveyance was made, and to show the whole transaction where the conveyance constitutes only a part of it; and in this way it may appear that the purchaser is under obligation to pay the mortgage debt, so that an assignment of the mortgage to him constitutes a merger.⁷

862. Merger in new security or judgment. — It is elsewhere noticed that a mortgage is not necessarily or even usually

¹ *Freeman v. M'Gaw*, 15 Pick. (Mass.) 82; *Hunt v. Hunt*, 14 Ib. 374; *Wolcott v. Winchester*, 15 Gray (Mass.), 461; *Hinds v. Ballou*, 44 N. H. 619. *Contra*, *Johnson v. Lewis*, 13 Minn. 364.

² *Jerome v. Seymour, Harr.* (Mich.) 357; *Bassett v. Hathaway*, 9 Mich. 28. In this case the holder of the mortgage conveyed to a purchaser of the equity of redemption all his "right, title, interest, claim, and demand, both at law and in equity, whether by deed, mortgage, or otherwise, and as well in possession as in

expectancy," and it was regarded as an undoubted discharge.

³ *Hancock v. Hancock*, 22 N. Y. 568.

⁴ *Welsh v. Phillips*, 54 Ala. 309.

⁵ *Astley v. Milles*, 1 Sim. 298, 345; *Howard v. Howard*, 3 Met. (Mass.) 548; *Wade v. Howard*, 11 Pick. (Mass.) 289; S. C. 6 Ib. 492.

⁶ *McCabe v. Swap*, 14 Allen (Mass.), 188.

⁷ *Frey v. Vanderhoof*, 15 Wis. 397; *Fiske v. McGregory*, 34 N. H. 414; and see *Miller v. Fichthorn*, 31 Pa. St. 252, 259; *Burnham v. Dorr*, 72 Me. 198.

merged by taking a new mortgage upon the same property for the old debt and further advances, or for the old debt and interest accrued upon it, or assessments paid upon the property; if the original mortgage has not been released,¹ the debt is not merged so as to affect the security by obtaining a judgment upon it, unless it is satisfied in whole or in part, when the debt is of course extinguished to the extent of the sum realized by the execution.²

When additional security is taken for a mortgage debt by a new mortgage upon the same or other property, a merger of the original security may be very readily prevented by a recital in the instrument creating the new security that it is given by way of further security, or as collateral to the old.³ Of course, in most cases, the nature of the transaction and the relations of the parties will be sufficient to show the intention without any such declaration.

863. A mortgage will not be kept alive in aid of a fraud or wrong, although in equity a mortgage substantially satisfied may be kept alive when this is requisite to the advancement of justice: this is never allowed when the result will be through the forms of law to aid in perpetrating a fraud or an injury.⁴

Generally, an assignment of the mortgage cannot be enforced. It is the mortgagee's duty to discharge merely.⁵ But whenever a decree is made that the mortgage upon payment or redemption be assigned, the decree should be limited so as not to prejudice the mortgagee in respect to any other liens he may have acquired upon the property, whether by attachment or otherwise.⁶ In New York, however, it is held that an assignment may be enforced when the mortgage is paid by one who is under no obligation to pay it.⁷ A mortgagor who has sold the mortgaged property subject to the mortgage, upon being compelled subsequently to pay the debt, is subrogated to the rights of the mortgagee, and may require from him an assignment of the bond and

¹ *Tenison v. Sweeny*, 1 Jones & L. 710.

² See *Bell v. Banks*, 3 Man. & G. 258; S. C. 3 Scott N. R. 497; *Higgins, ex parte*, 3 De G. & J. 33.

³ *Twopenny v. Young*, 3 B. & C. 208; *Pennell, ex parte*, 2 M., D. & De G. 273; *Whitbread, ex parte*, 2 M., D. & De G. 415.

⁴ *McGiven v. Wheelock*, 7 Barb. (N. Y.) 22; *Worthington v. Morgan*, 16 Sim. 547.

⁵ See § 1066; also, *James v. Biou*, 3 Swans. 234; *Colyer v. Colyer*, 9 L. T. N. S. 214; *Dunstan v. Patterson*, 2 Ph. 341; *Anon.* 2 Molloy, 505.

⁶ *Cilley v. Huse*, 40 N. H. 358.

⁷ § 1067.

mortgage, and if upon tender of the amount the mortgagee refuses to assign, he may be compelled to do so by action.¹

Neither will a mortgage be kept alive after payment, in the hands of one who occupies a fiduciary relation to the owners of the equity of redemption, so as to enable such holder to use it for his individual advantage; and although he has himself an interest in the land, he will not be allowed, in violation of a trust relation to the other, to cut off their interests by foreclosure.²

864. When a mortgage debt is paid by one who is bound by contract to pay it, an assignment of it to him upon payment operates as a discharge;³ and he will not be allowed to hold it as a subsisting incumbrance, as the payment was in pursuance of his agreement, and may be regarded as made with the mortgagor's money.⁴ Under this rule a mortgagor is not allowed, after having obtained a transfer of a first mortgage made by himself, to set it up against another mortgage of later date, which he has also made; and the rule applies equally in case he has obtained the first mortgage title by purchasing at a sale under the power.⁵

And so, if one who has conveyed land by a deed containing covenants of warranty afterwards purchases a mortgage upon the property which existed at the time of his conveyance, there is a merger of it.⁶

If the owner of lands acquires a tax title to the same under a sale made when he was the owner of the property, his purchase of the tax title is a redemption from the tax sale, and a deed to him of the tax title transfers no new title to him, but this title merges in his title to the lands.⁷

Where by the terms of an ante-nuptial contract a wife took an estate in fee in part of her husband's land, in lieu of dower, and, after marriage, he satisfied a mortgage upon such lands which was in existence at the time of the ante-nuptial contract, with money raised by a new mortgage, the wife's estate was held to be dis-

¹ Johnson v. Zink, 51 N. Y. 333.

² Knolls v. Barnhart, 71 N. Y. 474.

³ Lappen v. Gill, 129 Mass. 349; Ryer v. Gass, 130 Mass. 227.

⁴ Brown v. Lapham, 3 Cush. (Mass.) 551, 554; Strong v. Converse, 8 Allen (Mass.), 557, 559; Butler v. Seward, 10 Ib. 466; Bemis v. Call, 10 Ib. 512; Wada-

worth v. Williams, 100 Mass. 126; Burnham v. Dorr, 72 Me. 198.

⁵ Otter v. Vaux, 2 K. & J. 650; S. C. 6 De G., M. & G. 638; Johnson v. Webster, 4 De G., Mac. & G. 474.

⁶ Mickles v. Dillaye, 15 Hun (N. Y.), 296.

⁷ Gould v. Day, 94 U. S. 405.

charged from the first mortgage, and to be superior to the second.¹

865. The purchaser of land subject to a mortgage which he has assumed and agreed to pay, upon taking an assignment of it, thereby pays and satisfies it so far as his grantor is concerned;² and as to his grantor, the mortgage is paid and satisfied when such purchaser has paid the mortgage and had an assignment of it made to a third person. Not only is the mortgage extinguished when it is paid by a purchaser who has assumed the payment of it, but also when it is paid by his grantee, or by any grantee after successive conveyances.³ The premises in such case become the primary fund for the payment of the mortgage, and whoever acquires that fund and the mortgage also must be regarded as having applied the fund to the payment of the mortgage.⁴

If the owner of the equity of redemption of land who has assumed the payment of an existing mortgage purchases at a sale made in pursuance of a power, and the sale is invalid on account of the fraud of the mortgagee participated in by the purchaser, he cannot as against a subsequent mortgagee set up title through the prior mortgage, but this will be deemed to have merged,⁵

But the taking of a deed containing a recital that the premises are "subject to a mortgage" does not import a promise on the part of the purchaser to pay the mortgage; and does not prevent his holding the mortgage as a subsisting title upon a subsequent assignment of it to him.⁶ For stronger reasons one who has bought subject to a mortgage may properly induce a friend to purchase the mortgage. It makes no difference to the mortgagor whether one person or another owns it, and it does not change his relations to the purchaser or the mortgage creditor.⁷

But in Pennsylvania it is held that if one buys land at an execution sale subject to a mortgage, and subsequently pays off

¹ *Anglade v. St. Arvit*, 67 Mo. 434.

² *Fitch v. Cotheal*, 2 Sandf. (N. Y.) Ch. 29.

³ *Frey v. Vanderhoof*, 15 Wis. 397;

⁴ *Lilly v. Palmer*, 51 Ill. 331.

Mickles v. Townsend, 18 N. Y. 575; *Russell v. Pistor*, 7 N. Y. 171; *Coles v. Appleby*, 22 Hun (N. Y.) 72; *Burnham v.*

⁵ *Thompson v. Heywood*, 129 Mass. 401.

Dorr, 72 Me. 198; *Willson v. Burton*, 52 Vt. 394; *Winans v. Wilkie*, 41 Mich. 264; *Putnam v. Collamore*, 120 Mass. 454; *Tucker v. Crowley*, 127 Mass. 400;

⁶ *Strong v. Converse*, 8 Allen (Mass.), 557; *Pike v. Goodnow*, 12 Ib. 472; *Campbell v. Knights*, 24 Me. 332; *Tucker v. Crowley*, 127 Mass. 400. See § 748.

Thompson v. Heywood, 129 Mass. 401.

⁷ *Hall v. Harrington*, 41 Mich. 146.

the mortgage, the mortgage debt is thereby extinguished, and he cannot take an assignment of the mortgage and enforce it against the mortgagor.¹

866. This principle is of frequent application in determining the right of the mortgagor's widow to dower. The widow is clearly dowerable in an equity of redemption; but if she has relinquished her right of dower in the mortgage, she cannot recover it against the mortgagee or his assignee in possession, unless the mortgage has been assigned to one who is under obligation to pay and discharge the mortgage.² Her dower is subject to the mortgage, and if this be redeemed by the heir or purchaser, or by any one interested in the estate who is not bound to pay the debt, to avail herself of this right she must contribute her proportion of the charge, according to the value of her interest.³

If, however, the purchaser of the equity of redemption from the original mortgagor has assumed and agreed to pay the mortgage, and the wife of the mortgagor has released her dower in the mortgage but not in the deed to the purchaser, he cannot, upon taking an assignment of the mortgage, set it up against the claim of the widow of the mortgagor for her dower, but the assignment will be held to operate as a discharge, and the widow will be entitled to her dower in the whole estate.⁴

Where a mortgagee who has entered for foreclosure conveys his interest by quitclaim deed to one who has purchased the equity of redemption from the mortgagor's assignee in insolvency, the mortgage is not extinguished so as to let in a right of dower in the mortgagor's widow who released dower in the mortgage.⁵

This rule is fully approved in a recent case in Missouri, where a purchaser of an equity of redemption from an assignee in insolvency of the mortgagor, without taking an assignment of the mortgage, or making any attempt to keep it alive, paid it off. Although the wife of the mortgagor relinquished dower in the mortgage, yet, the mortgage having been cancelled and discharged without any mistake on the part of purchaser in doing so, the wife, upon the death of her husband, was held to be entitled to dower in the whole estate.⁶

¹ Dollar Savings Bank v. Burns, 87 Gr.) 349; Russell v. Austin, 1 Paige (N. Pa. St. 491. Y.), 192; McMahon v. Russell, 17 Fla.

² Farwell v. Cotting, 8 Allen (Mass.), 698.
211.

³ Norris v. Morrison, 45 N. H. 490; 188.
Hartshorne v. Hartshorne, 2 N. J. Eq. (1

⁴ McCabe v. Swap, 14 Allen (Mass.),

⁵ Savage v. Hall, 12 Gray (Mass.), 363.

⁶ Atkinson v. Angert, 46 Mo. 515.

But where the assignee in insolvency of the mortgagor pays the mortgage, in which the wife had released dower, out of the assets of the estate, and takes an assignment of the mortgage to himself, it remains an outstanding title against which the widow of the insolvent cannot have dower.¹ So if the mortgage be discharged by the heir or other person claiming under the husband, with no obligation imposed upon him to pay the mortgage, the widow takes her dower subject to the incumbrance of the mortgage debt. And even where the purchaser of an equity of redemption from the administrator of an insolvent estate gave a bond obligating himself to pay the mortgage debt, it was held that he might set up the mortgage title against the widow, because the obligation to pay the debt is in such case to be regarded merely as a personal contract of indemnity, in which the widow had no interest.²

But if an heir, for the purpose of preventing a sale of the real estate of the deceased for the payment of debts, gives a bond for their payment and takes an assignment of a mortgage upon part of the real estate to himself, the bond may be regarded as supplying the place of assets, which would otherwise have been derived from a sale of the lands, and would have left the rights of dower and homestead unaffected; and it is suggested that in such case the assignee should not be allowed to defeat these rights by holding the mortgage as an outstanding title and foreclosing it; and it was held that at any rate the heir could not do this after the estates of dower and homestead had in fact been set out to the widow, before the payment of the mortgage debt, with his assent.³

867. Payment by one who has warranted against incumbrances. — One who has executed two mortgages to different persons upon the same land, with covenants of warranty, upon redeeming the first mortgage, in fact pays his own debt, and thereby discharges the mortgage, and cannot set it up as the ground of a claim to redeem the second after that has been foreclosed. The payment of the mortgage when it was his duty to pay it gives him no right to be regarded as an equitable assignee of it, and to be subrogated to the rights of the first mortgagee.

¹ *Sargeant v. Fuller*, 105 Mass. 119.

See, however, *Atkinson v. Stewart*, 46 Mo.

510; *Jones v. Bragg*, 33 Mo. 337.

² *Gibson v. Crehore*, 3 Pick. (Mass.)

475; S. C. 5 Ib. 146.

³ *King v. King*, 100 Mass. 224.

The covenants of warranty in the second mortgage also estop him from setting up the first mortgage against the second mortgagee.¹

Upon this principle, also, when one who has conveyed land with warranty, which is subject to a mortgage, whether made by him or by another, afterwards takes an assignment of such mortgage, he holds it for the benefit of the person to whom he has granted the land, and the mortgage is in fact discharged by coming into his hands. Even if he should assign it to one who in good faith pays full consideration for it, the purchaser would acquire no lien upon the land.²

When one sells land by warranty a mortgage held by him upon the land at that time is extinguished, unless it was understood by the grantee that it should be continued in force for his benefit;³ but this rule, of course, does not apply to a mortgage taken for the purchase money of a sale, although the mortgage bear an earlier date than the deed of sale.⁴ In like manner if the owner mortgage the estate without noticing the mortgage title held by him, it is regarded as merged.⁵

868. An assignment to the owner of the equity of redemption who is not the original mortgagor, but a subsequent purchaser, will not generally operate as a discharge or merger of the mortgage, because it is his manifest interest to hold the two different titles distinct, if he has any occasion for protection against any other intervening interest or title.⁶ In such case it is immaterial whether the transfer be effected by an assignment in the usual form, or by a deed of release or quitclaim. If such purchaser of the equity of redemption obtains an assignment of the mortgage pending a bill against the mortgagor for a foreclosure, he may, with the consent of the mortgagee, prosecute the suit to a decree of foreclosure and sale, for the purpose of more effectually securing his title.⁷ Still less is there a merger where a mortgage is purchased by one partner and the equity of redemption by the other, both purchases being made out of the partnership

¹ *Butler v. Seward*, 10 Allen (Mass.), 466. Otherwise under a quitclaim deed. *Comstock v. Smith*, 13 Pick. (Mass.) 116; *Trull v. Eastman*, 3 Met. (Mass.) 121.

² *Mickles v. Townsend*, 18 N. Y. 575; *Collins v. Torrey*, 7 Johns. (N. Y.) 278.

³ *Stoddard v. Rotton*, 5 Bosw. (N. Y.) 378.

⁴ *Fish v. Gordon*, 10 Vt. 288.

⁵ *Tyler v. Lake*, 4 Sim. 351.

⁶ *Savage v. Hall*, 12 Gray (Mass.), 363; *Grover v. Thatcher*, 4 Ib. 526; *Wyman v. Hooper*, 2 Ib. 141, 145; *Loud v. Lane*, 8 Met. (Mass.) 517; *Pitts v. Aldrich*, 11 Allen (Mass.), 39; *Ryer v. Gass*, 130 Mass. 227.

⁷ *Branch Bank at Mobile v. Hunt*, 8 Ala. 876.

funds and for their joint benefit; for the taking of the estates in different names showed an intention to keep them distinct.¹

Some of the earlier cases in England seemed to incline strongly against allowing a purchaser of the equity of redemption to keep up a mortgage charge upon the property for his own benefit, and to defeat subsequent incumbrances; but the later cases hold that such purchaser, having paid off a first mortgage, may, when he has shown an intention of doing so, stand in the first mortgagee's place against the next incumbrancer.²

869. The rule that payment by a mortgagor extinguishes the mortgage is founded upon the reason that there could generally be no advantage to him in keeping on foot his own mortgage against his own estate. But no such reason exists when a purchaser pays an incumbrance existing before the time of his purchase. Frequently there is an advantage in keeping the mortgage on foot as a security; and whenever there is such advantage the purchaser is entitled to hold it as a separate title.³

If a mortgage be paid by a person not personally liable, for the purpose of protecting his estate, he may have the benefit of it in aid of his title, without any assignment to him, or express proof of an intention on his part to keep it alive.⁴ And even if the mortgage be discharged of record without consideration, but for the sole benefit of the owner of the equity, the mortgage is not extinguished as to a subsequent mortgagee; but he must redeem this mortgage from such owner before he will be allowed to foreclose his own mortgage.⁵ If, however, there be any obligation on his part to pay the debt, he cannot stand upon the mortgage paid to help his title as against the party whom he is bound to protect against the mortgage.⁶

If the incumbrance be paid by a mere volunteer or stranger to the title, having no interest to make the payment for his own

¹ *Scott v. Webster*, 44 Wis. 185; S. C. 6 Reporter, 287; 50 Wis. 53.

² *Watts v. Symes*, 1 De G., M. & G. 240, reviewing the earlier cases.

³ *Abbott v. Kasson*, 72 Pa. St. 183; *Millsbaugh v. McBride*, 7 Paige (N. Y.), 509; *Skeel v. Spraker*, 8 Paige (N. Y.), 182; *Pool v. Hathaway*, 22 Me. 85; *Hatch v. Kimball*, 16 Me. 146; *Thompson v. Chandler*, 7 Me. 377; *Carll v. Butman*, *Ib.* 102.

⁴ *Walker v. King*, 44 Vt. 601; S. C. 45 Vt. 525; *Wheeler v. Willard*, 44 Vt. 640; *Warren v. Warren*, 30 Vt. 530; *McMahon v. Russell*, 17 Fla. 698; *Ryer v. Gass*, 130 Mass. 227; *Hinds v. Ballou*, 44 N. H. 619.

⁵ *Spanliding v. Crane*, 46 Vt. 292; *Young v. Hill*, 31 N. J. Eq. 429.

⁶ *McDaniels v. Flower Brook Manuf. Co.* 22 Vt. 274; *Manwaring v. Powell*, 40 Mich. 371.

protection, the payment is not compulsory, and the party paying cannot be treated as an equitable assignee of the mortgage.¹

870. Acquisition of the equity of redemption by the mortgagee. — Although, as elsewhere explained, the purchase of the mortgagor's equity of redemption by the mortgagee is looked upon with suspicion by the courts, because he has, by reason of his position as creditor, a certain advantage over the mortgagor which may be abused, yet if the purchase be free from fraud, and for an adequate price, it is sustained.² This objection, however, does not apply with equal force when he purchases the equity of redemption from one who has purchased it of the mortgagor, or when he purchases at an execution sale had at the instance of a stranger. The mortgagee, while he is not generally permitted to sell the equity of redemption under an execution obtained upon the mortgage debt, may generally do so under an execution for any other debt to him, and may purchase at the sale. But the result of his acquiring the equity of redemption in either way is generally to merge his mortgage title in it, unless there be some reason why he should keep the titles separate.³

Where a purchaser has assumed the payment of a mortgage, and has subsequently conveyed the land to the mortgagee by a deed reciting that the conveyance is subject to the mortgage, "which mortgage forms part of the above consideration," the mortgage will be regarded as paid and discharged, so that the mortgagee cannot maintain an action against the mortgagor upon the mortgage note, although the value of the land at the time of the conveyance be less than the debt secured.⁴

When a mortgagor pays his mortgage debt, his object is generally to fulfil the personal obligation of payment, and relieve his estate of the incumbrance.

When a mortgagee acquires the equity of redemption it is generally because he wants a settlement, and can get nothing more than the full control of the property, or else because he has use for the mortgaged land, and wants an absolute title to it. In either case his primary object is to perfect the title in himself. It must follow therefore that while, as a general rule, the mortgagor's in-

¹ Downer v. Wilson, 33 Vt. 1.

² See, also, Barnes v. Brown, 71 N. C. 507; West v. Reed, 55 Ill. 242; § 1042.

³ Barnes v. Brown, *supra*; Weiner v. Heints, 17 Ill. 259.

⁴ Dickason v. Williams, 129 Mass. 182.

This case, though treated in the decision as one chiefly of merger, presents more strongly the issues of estoppel and payment.

tention is to extinguish the mortgage, the mortgagee on the other hand almost always desires to hold the title he has, and simply to acquire the title which he has not. Hence it will be noticed, in examining these two classes of cases, that a merger of the estates occurs much more frequently in the mortgagor than in the mortgagee, and that the expressions against a merger are much more decided when the estates unite in the latter than when they unite in the former; the different relations in which the two persons stand to the debt and to the property account for this; their intentions are generally different.

There is, generally, an advantage to the mortgagee in preserving his mortgage title; and when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, unless such appears to have been the intention of the parties and justice requires it;¹ and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force.²

The fact that the consideration expressed in the deed of the equity of redemption is greater than the amount of the grantee's mortgage affords no evidence of an intent to merge the mortgage.³ The fact that the mortgage remains uncanceled of record, on the other hand, affords a presumption that such was not the intent of the mortgagee.⁴ A statement in a deed of the equity of redemp-

¹ *New Jersey Ins. Co. v. Meeker*, 40 N. J. L. 18; *Mulford v. Peterson*, 35 N. J. L. 127; *Duncan v. Smith*, 31 N. J. L. 325; *Thompson v. Boyd*, 21 N. J. L. (1 Zab.) 58; S. C. 22 Ib. 543; *Woodhull v. Reid*, 16 N. J. L. (1 Harr.) 128; *Freeman v. Paul*, 3 Me. 260; *Mallory v. Hitchcock*, 29 Conn. 127; *Delaware & Hudson Canal Co. v. Bonnell*, 46 Conn. 9; *Goodwin v. Keney*, 47 Conn. 486; *Brooks v. Rice*, 56 Cal. 428; *Linscott v. Lamart*, 46 Iowa, 312; *Wickersham v. Reeves*, 1 Iowa, 413; *Knowles v. Lawton*, 18 Ga. 476; *Fithian v. Corwin*, 17 Ohio St. 118; *Walker v. Baxter*, 26 Vt. 710; *Forbes v. Moffatt*, 18 Ves. 384 a; *Slocum v. Catlin*, 22 Vt. 137; *Edgerton v. Young*, 43 Ill. 464; *Dunphy v. Riddle*, 86 Ill. 22; *Huebsch v. Scheel*, 81 Ill. 281; *Richardson v. Hock-*

enhull, 85 Ill. 124; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Clos v. Boppe*, 23 N. J. Eq. 270; *Hoppock v. Ramsey*, 28 N. J. Eq. 13; *Tower v. Divine*, 37 Mich. 443; *McClaskey v. O'Brien*, 16 W. Va. 791, 793; *Rogers v. Herron*, 92 Ill. 583; *Ætna L. Ins. Co. v. Corn*, 89 Ill. 170.

A mortgagee taking a conveyance of the equity of redemption is entitled to be regarded as a purchaser for value within the meaning of a statute relating to the docketing of judgments. *McClaskey v. O'Brien*, 16 W. Va. 791, 793.

² *First Nat. Bank of Waterloo v. Elmore*, 52 Iowa, 541; *Ætna L. Ins. Co. v. Corn*, *supra*.

³ *Hoppock v. Ramsey*, 28 N. J. Eq. 413.

⁴ *Hoppock v. Ramsey*, *supra*.

tion that the premises are subject to the mortgage shows an intention not to extinguish this.¹

If the mortgagee has already transferred his mortgage as collateral security for the payment of a debt at the time he purchased the equity of redemption, there can be no pretence that a merger takes place, for the different estates in such case do not vest in the same person.² Nor can there reasonably be any such pretence when the deed itself to the mortgagee refers to the mortgage as a subsisting lien, and is expressly made subject to it.³

That the mortgagee afterwards assigns the mortgage to another is evidence of his intent to keep the interests separate; and it does not matter that this intent was not declared, and did not exist at the time the two interests became vested in the mortgagee.⁴

871. If a mortgagee purchase the equity of redemption and give up the mortgage note, without intending this to operate as a payment, the mortgage not being discharged, there is no merger or extinguishment of the mortgage, as against an intervening title, as, for instance, by levy, judgment, or conveyance.⁵ The assignee of a mortgage covering two separate parcels of land, having purchased one of them, can collect only the ratable proportion from the other;⁶ and so if the assignee of a mortgage take a conveyance of the equity of redemption of one half of the mortgaged premises described as one lot, this operates to extinguish only a part of the mortgage debt, leaving the assignee at liberty to foreclose for the residue.⁷ The intention of the holder of the mortgage at the time of taking the deed of the equity of redemption is considered as the controlling consideration.⁸ This intention and the rights of the parties may be controlled by an agreement between them.⁹

872. Purchasers cannot rely upon the record as showing merger, inasmuch as merger generally takes place or not ac-

¹ *Etna Life Ins. Co. v. Corn*, 89 Ill. 170; S. C. 7 Reporter, 266.

² *Campbell v. Vedder*, 1 Abb. (N. Y.) App. Dec. 295; *Kellogg v. Ames*, 41 N. Y. 259, reversing 41 Barb. 218; *White v. Hampton*, 13 Iowa, 259.

³ *Campbell v. Vedder*, *supra*; *Sheldon v. Edwards*, 35 N. Y. 279.

⁴ *Goodwin v. Keney*, 47 Conn. 486.

⁵ *New Eng. Jewelry Co. v. Merriam*, 2

Allen (Mass.), 390; *Mulford v. Peterson*, 35 N. J. L. 127; *Walker v. Baxter*, 26 Vt. 710; *Day v. Mooney*, 4 Hun (N. Y.), 134.

⁶ *Colton v. Colton*, 3 Phil. (Pa.) 24.

⁷ *Klock v. Cronkhite*, 1 Hill (N. Y.), 107.

⁸ *Shaver v. Williams*, 87 Ill. 469.

⁹ *Savings Bank v. Grant*, 41 Mich. 101.

ording to the actual or presumed intention of the mortgagee. They must go beyond this, and ascertain whether there has been a merger in fact; and they act at their own peril if they do not require their grantor to produce the mortgage and note supposed to be merged, and discharge the mortgage of record, or show that it constitutes a part of the title to the estate.¹ If there has been no merger, and the mortgage title remains as a separate interest, it is, of course, essential for the purchaser to purchase this title as well as the equity of redemption; but, as has elsewhere been shown, one who buys a mortgage without requiring the delivery of the mortgage note or bond is chargeable with notice that it has been assigned to some one else; he is not a purchaser in good faith, but is chargeable with knowledge of fraud. Therefore, although he may purchase from one who by the records appears to be the owner of the entire estate, holding the equity of redemption from one source and the mortgage from another, and although he takes a conveyance with full covenants of warranty, it may turn out that some other person has a valid title to the mortgage.²

873. Such acquisition may be regarded as an extinguishment of the equity rather than a merger of the mortgage. This was the view taken by Mr. Justice Story in a case before him in the United States Circuit Court.³ "As to the merger," he said, "it is clear that there can be no such operation as the argument supposes. At law, by the mortgage, a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich would be to extinguish the equity of redemption, and thus to remove the condition. If that conveyance was good, it had the effect not to enlarge the estate, but to extinguish a right. It was not the drowning of a lesser in a greater estate, for the estate was already a fee simple: but it was an extinguishment of the condition or equity." Of course this doctrine would not be held where a mortgage is regarded not as an estate in fee, but merely as a lien, the fee and general ownership

¹ *Aiken v. Milwaukee & St. Paul R. R. Co.* 37 Wis. 469; *Morgan v. Hammett*, 34 Wis. 512; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Purdy v. Huntington*, 42 N. Y. 334; *Oregon & Washington Trust Investment Co. v. Shaw*, 5 Sawyer, 336, quoting and approving the above. See § 474.

² §§ 474, 961; *Purdy v. Huntington*, 42 N. Y. 334; *Miller v. Lindsey*, 19 Hun (N. Y.), 207.

³ *Dexter v. Harris*, 2 Mason, 531; and see *Stantons v. Thompson*, 49 N. H. 272, where a release of the equity of redemption had been made to the mortgagee.

remaining in the mortgagor ; but the lesser interest would merge in the greater.

Even when the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. It is presumed, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security ; and this presumption applies, although the parties through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and cancelled the notes, and really intended to extinguish them.¹ The circumstances of the case must, however, be such that no injustice will be done to any one else, as where the mortgagee has taken a conveyance of the property in satisfaction of the debt, and though he has discharged his mortgage, he has done nothing else to preclude the supposition that he intended to take the property in satisfaction of the debt.²

It may, therefore, be deduced from the authorities as a general rule, that when the mortgagee acquires the equity of redemption in whatever way, and whatever he does with his mortgage, he will be regarded as holding the legal and equitable titles separately, if his interest requires this severance.³ The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend.

Even if a mortgagee, in taking a conveyance of the mortgaged property in satisfaction of the mortgage debt, stipulates that he will procure the release of the property from a certain lien junior to his mortgage, he is held not to bind himself to pay such junior lien, nor to render such lien superior to his mortgage, but simply to release the grantor from any obligation to remove it.⁴

Where a purchaser of the equity of redemption conveyed the land by warranty deed to the mortgagee, but did not take up the original notes or procure a discharge, but on the other hand took

¹ § 871; *Young v. Hill*, 31 N. J. Eq. 429; *Stantons v. Thompson*, 49 N. H. 272, per Bellows, C. J. Iowa, 265, 268; *Stimpson v. Pease*, 53 Iowa, 572.

² *Stantons v. Thompson*, *supra*; and see *Washington Co. v. Slaughter*, 54

³ *Stantons v. Thompson*, *supra*; *Besser v. Hawthorn*, 3 Oregon, 129; *Woodward v. Davis*, 53 Iowa, 694.

⁴ *Woodward v. Davis*, 53 Iowa, 694.

a bond for a conveyance of the land upon the payment of the original notes within a limited time, it was held that the mortgage was not discharged, nor was an absolute title vested in the mortgagee subject only to the stipulations of the bond ; but that the transaction was merely a reaffirming of the mortgage, with an extension of the time of payment.¹

PART II.

• SUBROGATION.

874. Subrogation arises by operation of law whenever the mortgage debt has been extinguished by one other than the debtor, entitled to redeem. An assignment implies a continued existence of the debt, and the equitable right does not then arise.² "The subrogation or substitution, by operation of law, to the rights and interests of the mortgagee in the land is on and by redemption ; and redemption is payment of the mortgage debt, after forfeiture, by the terms of the mortgage contract ; so that really the subrogation or substitution, by operation of law, arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond and mortgage assign them to a party claiming a right to redeem, the latter is subrogated, by the assignment, to the mortgage debt and mortgage security, and to the instruments evidencing such debt and security, and there is no room or occasion for subrogation by operation of law."³

"Subrogation generally takes place between co-creditors, where the junior pays the debt due to the senior, to secure his own claim ; or it arises from the transactions of principals and sureties, and sometimes between co-sureties or co-guarantors. It is not allowed to volunteer purchasers or strangers, unless there is some peculiar equitable relation in the transaction, and never to mere meddlers. But while this is the rule generally, we think that a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, should be subrogated to the rights of the creditor."⁴ A purchaser at a foreclosure sale, supposing that he had obtained a good title by his purchase, sold

¹ *Bailey v. Myrick*, 50 Me. 171.

² Per Mr. Justice Sutherland, in *Ellis*.

³ Per Mr. Justice Colt, in *Lamb v. worth v. Lockwood*, 42 N. Y. 89, 97.

⁴ Per Chief Justice Biddle, *Muir v. Berkshire*, 52 Ind. 149.

the land to another by warranty deed. The mortgagor having recovered the land on account of irregularities in the foreclosure sale, the purchaser was sued upon his covenant of warranty in his deed of the property, and was obliged to pay the value of it. But it was held that he was entitled to be subrogated to the rights of the mortgagee, as an equitable assignee.¹

Under the equitable principle of subrogation, one who pays a debt for the benefit of another, whether voluntarily or for his own protection, acquires a right to the security held by the other;² and upon the same ground a principal creditor succeeds to the security held by a surety whose liability has become fixed. If a mortgage on partnership real estate be discharged by one partner, when as between the partners it was the duty of the other to pay it, an equity arises in favor of the partner so paying the mortgage entitling him to indemnity through it.³

If a surety's liability has never become fixed and absolute, either by his having been obliged to pay the debt for which he is surety or by a judgment against him, the principal creditor cannot claim the security by subrogation.⁴

The right of subrogation applies in general in favor of any person having an interest in the property who, not being under any obligation to pay the mortgage debt, does so for the benefit of the debtor;⁵ as by furnishing money to the mortgagor to take up the mortgage under an agreement to execute a new one;⁶ or by a purchaser's paying a judgment in *scire facias* against the mortgagor.⁷ So, also, a junior incumbrancer who pays a prior incumbrance upon the property is thereby subrogated to the security.⁸

874 a. A mere stranger however is not subrogated to the security by paying it for the benefit of the mortgage debtor except by express agreement. It is only in cases where the person paying the debt stands in the situation of a surety, or is com-

¹ *Muir v. Berkshire*, 52 Ind. 149.

² *Homœopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Denton v. Cole*, 30 N. J. Eq. 244; *Laylin v. Knox*, 41 Mich. 40; *Levy v. Martin*, 48 Wis. 198.

³ *Laylin v. Knox*, *supra*; *National Bank of Royalton v. Cushing*, 53 Vt. 321.

⁴ *Grant v. Ludlow*, 8 Ohio St. 1; *McCullum v. Hinckley*, 9 Vt. 149; *Plant-*

ers' Bank v. Douglass, 2 Head (Tenn.), 699.

⁵ *Carter v. Taylor*, 3 Head (Tenn.), 30; *Roddy's Appeal*, 72 Pa. St. 98.

⁶ *Lockwood v. Marsh*, 3 Nev. 138; *Denton v. Cole*, *supra*.

⁷ *Matteson v. Thomas*, 41 Ill. 110.

⁸ *Dings v. Parshall*, 7 Hun (N. Y.), 523; *Ellsworth v. Lockwood*, 42 N. Y. 89, 96; *Brainard v. Cooper*, 10 N. Y. 356; *Cobb v. Dyer*, 69 Ma. 494, 498.

pelled to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in place of the creditor, as a matter of course, without any special agreement.¹ One who loans money to another with which to pay off a mortgage is not subrogated to the mortgage security unless by special agreement with the borrower.² But a mortgagee who loaned money at the request of executors to pay a prior mortgage of lands of the estate and also accrued taxes on the lands, and took as security for such advances a mortgage of the same lands made by the executors in pursuance of a license of the county court, which was, however, invalid, is not to be treated as a volunteer in the legal sense of that term, but is entitled to be subrogated to the rights of the prior mortgagee.³

A stranger may be subrogated to the interest of a mortgagee, as against a subsequent mortgagee or purchaser, by force of an agreement made with the mortgagor and mortgagee at the time of paying the mortgage debt or any part of it to the latter. This may be called a conventional subrogation.⁴

875. The rule as to marshalling assets applies as between different creditors, so that where one has two funds and the other only one of them, the former is required to satisfy his claim out of the fund upon which the other has no lien. It is not applicable as between a debtor and creditor; and the mortgagor cannot compel a mortgagee to resort to the land, the equity of redemption of which has been sold on execution, instead of proceeding on the mortgage note to collect the debt.⁵ The purpose of the doctrine of marshalling assets is the protection so far as possible of subsequent interests; and it must not be applied to the mortgagee's injury.⁶

876. The test of the right of subrogation is found in answer to the inquiry whether the person who paid the mortgage debt is the one whose duty it was to pay it first of all; if the debt was not primarily his, and he only occupied the position of surety to

¹ *Richmond v. Marston*, 15 Ind. 134; *Spray v. Rodman*, 43 Ind. 225; *McClure v. Andrews*, 68 Ind. 97; *Faurot v. Neff*, 32 Ohio St. 44; *National Bank of Royalton v. Cushing*, 53 Vt. 321; *Beaver v. Slanker*, 94 Ill. 175; *Hough v. Etna L. Ins. Co.* 57 Ill. 318, 319.

² *Owens v. Johnson*, 8 Bax. (Tenn.) 265.

³ *Levy v. Martin*, 48 Wis. 198.

⁴ *Shreve v. Hawkinson*, 34 N. J. Eq. 76.

⁵ *Rogers v. Meyers*, 68 Ill. 92. See § 728.

⁶ *Detroit Sav. Bank v. Truesdail*, 38 Mich. 430.

the mortgagor, he is entitled to be subrogated to the position of the mortgagee when he has paid the debt.¹

A mortgage discharged of record may be reinstated when it has been paid by one who had bought the premises subject to the mortgage, and in ignorance of the existence of a judgment lien subsequent to the mortgage. Upon payment he is entitled to all the rights of the mortgagee, and, according to the law in New York, to an assignment of the mortgage; and having caused it to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give him the benefit of the equitable right of subrogation.²

877. When a mortgage is paid by one who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the title so acquired as against subsequent incumbrances, although he had also acquired the equity of redemption. In such case no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it. His payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it.³

When a third person, at the instance of the mortgagor, pays part of the mortgage debt, but takes no assignment of the mortgage, and no agreement for any, he is not thereby subrogated to the right of the mortgagee as against a subsequent incumbrance: to effect this there must be something more than mere payment, and silent receipt of the money by the mortgagee.⁴ But if a third person pay the whole of the mortgage debt at the request of the mortgagor, and receives the note and mortgage as a secu-

¹ *Russell v. Pistor*, 7 N. Y. 171; *Klock v. Cronkhite*, 1 Hill (N. Y.), 107; *Tice v. Annin*, 2 Johns. (N. Y.) Ch. 125; *McGiven v. Wheelock*, 7 Barb. (N. Y.) 22; *Rogers v. Traders' Ins. Co.* 6 Paige (N. Y.), 583; *Miller v. Winchell*, 70 N. Y. 437; *Pickett v. Merchants' Nat. Bank of Memphis*, 32 Ark. 346, 375; *Young v. Morgan*, 89 Ill. 199; *S. C. 11 Chicago L. N. 46*; *Flagg v. Geltmacher*, 98 Ill. 293.

² *Barnes v. Mott*, 64 N. Y. 397; and see *Young v. Morgan*, 89 Ill. 199.

³ *Walker v. King*, 45 Vt. 525; *S. C. 44* Ib. 601, and see cases cited; *Wheeler v. Willard*, 44 Vt. 640; *Tichout v. Harmon*,

2 Aik. (Vt.) 37; *Johnson v. Parmely*, 14 Hun (N. Y.), 398; *Robinson v. Urquhart*, 12 N. J. Eq. (1 Bea.) 515; *Traders' Building Association v. Thompson*, 32 N. J. Eq. 133; *Coe v. N. J. Midland R. R. Co.* 31 N. J. Eq. 105, 135; *Ward v. Seymour*, 51 Vt. 320; *White v. Hampton*, 13 Iowa, 259; *Holten v. Board of Comm'rs of Lake County*, 55 Ind. 194; *Warren v. Hayzlett*, 45 Iowa, 235; *Cobb v. Dyer*, 69 Me. 494.

⁴ *Virginia v. Ches. & Ohio Canal Co.* 32 Md. 501, 546; *Swan v. Patterson*, 7 Md. 164; *Collins v. Adams*, 53 Vt. 433.

urity for the money advanced, he is in equity subrogated to the rights of the mortgagor.¹

Even if a person advancing money to pay a mortgage, under an agreement with the owner of the equity of redemption that it should be assigned to him as security for the money advanced, takes a discharge of the mortgage, he is entitled to be subrogated to the rights of the mortgagee and have the discharge vacated.²

But if a third person furnishes money to enable a mortgagor to pay off a mortgage upon the promise of the latter to give the lender a first mortgage upon the premises, and the first mortgage is discharged, and after some delay a new mortgage is given to the lender, this does not take precedence of a second mortgage which was outstanding upon the property, and duly recorded, but of which the lender had no actual notice; especially as against an assignee of such mortgage who in good faith and without knowledge of the agreement under which the money was borrowed for the payment of the first mortgage, took his assignment after the discharge of the first of record.³

878. Where a mortgagee has been compelled, for his own protection, to pay the amount of a prior mortgage upon the property, and instead of taking an assignment of the mortgage so paid, this is discharged of record, he is nevertheless entitled to indemnify himself for this payment out of the mortgaged estate. But if, in the mean time, a *bond fide* purchaser, relying upon the record, has bought the estate subject only to the second mortgage, the amount of the first mortgage so paid cannot, it would seem, be claimed out of the estate as against him. Where, however, the whole amount claimed by the junior mortgagee upon his

¹ *Candle v. Murphy*, 89 Ill. 352.

² *Morgan v. Hammett*, 23 Wis. 30.

³ *Holt v. Baker*, 58 N. H. 276, 278.

"The plaintiff does not bring his case within the principle of the cases cited. He did not own and was not purchasing the equity of redemption in the land, and then paying the prior mortgage without notice of the subsequent one. He did not own a subsequent mortgage and pay the prior one, with the defendants' mortgage intervening. He had no interest in or security on the estate to protect, but made a loan of money to the mortgagor, on his statement that he was borrowing the money to pay the first mortgage, and that the plaintiff should have a first mortgage

on the land as security. By loaning the money to mortgagor, and trusting him to furnish security as good as the first mortgage, he enabled him to make a record of the discharge of that mortgage, and postpone his security to the defendants' mortgage. The defendants purchased their mortgage on the faith of a record showing the discharge of the first mortgage and no prior incumbrance, and neither they nor their assignor had any notice of the plaintiff's transaction with mortgagor. If the parties are equally innocent, and one must suffer from the conduct of the mortgagor, the plaintiff, who enabled him to occasion the loss, should sustain it."

own mortgage, and that paid off by him, was less than the amount of his own mortgage and interest as it stood upon record, he was allowed, in a suit against him for redemption, to reimburse himself for the sum so paid.¹

When a junior incumbrancer redeems from a prior lien, intermediate or subsequent incumbrancers, in equity, must refund the redemption money, or pay all liens anterior to theirs before they can enforce their claims upon the property. The junior mortgagee, by redeeming from the prior mortgage, is subrogated to the rights of the first mortgagee. If it were otherwise, it would be impossible, in a large number of cases, for a junior mortgagee to secure his debt, as the first mortgagee is not obliged to assign his mortgage on payment.²

A second mortgagee who has paid taxes or other assessments upon the mortgaged property is entitled by equitable subrogation to hold the lien of such taxes or assessments even as against the first mortgagee.³

But a voluntary payment by a mortgagee of claims against the mortgaged property, which it was not necessary for his own protection that he should pay, does not entitle him to be subrogated to the rights of the creditors whose liens he has discharged.⁴

The same rule prevails when the mortgagor sells and conveys a portion of the mortgaged premises, subject to the mortgage, and the purchaser retains enough of the purchase money to satisfy the mortgage and agrees to pay it; the mortgagor and purchaser stand in the relation of principal and surety as to the mortgage debt, and the premises sold are primarily chargeable with the payment of it.⁵ If the mortgagor be compelled to pay the debt he is subrogated to the rights of the mortgagee against the land.⁶

If one joint mortgagor, in order to protect his interest, pays the joint debt, he is subrogated to the interest of his joint mortgagor until he is repaid.⁷

879. If a mortgagor purchase his own mortgage on land that he has sold subject to the mortgage, which the purchaser

¹ *Davis v. Winn*, 2 Allen (Mass.), 111.

⁵ *Russell v. Pistor*, 7 N. Y. 171; *Halsey v. Reed*, 9 Paige (N. Y.), 446.

² *Flachs v. Kelly*, 30 Ill. 462; *Downer v. Fox*, 20 Vt. 388; *Wood v. Hubbard*, 50 Vt. 82; *Ward v. Seymour*, 51 Vt. 320; *Shimer v. Hammond*, 51 Iowa, 401. See § 1098.

⁶ *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113; *Smith v. Ostermeyer*, 68 Ind. 432, 435.

³ *Fiacre v. Chapman*, 32 N. J. Eq. 463.

⁷ *Fisher v. Dillon*, 62 Ill. 379; *Simpson v. Gardiner*, 97 Ill. 237.

⁴ *Bayard v. McGraw*, 1 Bradw. (Ill.)

has agreed to pay as part of the consideration of the sale, the bond or note is, of course, rendered unavailing; but the mortgage having become the principal security for the payment of the debt, the mortgagor, without taking an assignment of the mortgage, is entitled to be subrogated to this security, and to be repaid out of the land what he has paid upon the mortgage debt.¹

If the mortgagee, with knowledge of the mortgagor's right to have the property applied to the payment of the mortgage debt, does anything to impair this right, as, for instance, if he releases a portion of the mortgaged premises, he must suffer the loss himself, by being deprived to that extent of his right of recourse to the mortgagor, who, in such case, stands in the position of a surety.²

The satisfaction of a judgment for a mortgage debt, by the levy of an execution on other property of the mortgagor than that mortgaged, is such a payment of the debt by him that he is subrogated to the security, when justice requires that the mortgage should be assigned to him rather than discharged.³

880. When mortgage is enforced upon other property. —

When an equity of redemption has been sold upon execution for a debt other than that secured by mortgage on the premises, the purchaser acquires only an estate subject to the mortgage debt, and if this be subsequently enforced from other property of the mortgagor, the latter will be subrogated to all the rights of the mortgagee under this mortgage, and thus protected against the purchaser under execution. The rule is the same where sale is made of a part of the mortgaged premises under execution obtained upon one of several mortgage notes. The purchaser takes the property subject to the payment of a share of the mortgage debt remaining unsatisfied.⁴

881. An indorser or surety of a note, upon being compelled to pay it, is entitled to the benefit of any security, as, for instance, a mortgage given by the principal debtor to the holder of the note to secure it. Without any assignment of it he is by force of law subrogated to the benefit of it.⁵ Where a partner

¹ Stillman v. Stillman, 21 N. J. Eq. 126; Ely v. Stannard, 44 Conn. 528; Hart v. Chase, 46 Conn. 207; Greenwell v. Heritage, 71 Mo. 459; Welton v. Hull, 50 Mo. 295; Flagg v. Geltmacher, 98 Ill. 293. and see Eddy v. Traver, 6 Paige (N. Y.), 521; Cheesebrough v. Millard, 1 Johns. (N. Y.) Ch. 409, 412.

² Woodbury v. Swan, 58 N. H. 380.

³ Funk v. McReynold, 33 Ill. 481.

⁴ Drew v. Lockett, 32 Beav. 499;

⁵ Ingalls v. Morgan, 10 N. Y. 178, 187; O'Hara v. Haas, 46 Miss. 374; Gossin v.

has assumed the payment of a note of the firm, and executed a mortgage to the payee to secure its payment, and to indemnify his copartner, the latter is subrogated to the rights of the mortgagee to the extent of any payment he may have to make upon the note.¹ In like manner, when a mortgage has been assigned by a debtor to a surety or indorser, or to a trustee for his benefit, to secure him against his liability upon the debt, the creditor is entitled to the benefit of the security.² The mortgage creates a trust and equitable lien in favor of the creditor, and this lien attaches to the property in his favor, although the mortgage be assigned.³

A surety upon paying one of several notes or bonds secured by mortgage, is subrogated to a proportionate part of the mortgage, the mortgagee becoming a trustee therefor.⁴

In like manner, if the mortgagor sells the premises subject to the mortgage, and afterwards either pays the mortgage debt voluntarily, or it is collected of him by suit, he is subrogated to the rights of the mortgagee, and may enforce the mortgage upon the land.⁵ In such case the mortgagor, as between himself and his grantee, is a mere surety for the payment of the debt, and the premises are the primary fund, and he is entitled to the benefit of it.⁶

A mortgage given to several guarantors of a debt, to indemnify them against a joint and several liability upon it, when the debt is paid by one of them, is held in trust by the mortgagees for his benefit.⁷

882. Whether surety is subrogated to the debt as well as the security. — A distinction is taken in the English cases, which, however, does not generally hold good in this country, to the

Brown, 11 Pa. St. 527; *Muller v. Wadlington*, 5 S. C. 342; *Ottman v. Moak*, 3 Sandf. (N. Y.) Ch. 431; *Fields v. Sherrill*, 18 Kans. 365; *Motley v. Harris*, 1 Lea (Tenn.), 577; *Beaver v. Slanker*, 94 Ill. 175; *Richeson v. Crawford*, 94 Ill. 165; *Darst v. Bates*, 95 Ill. 493; *Murrell v. Scott*, 51 Tex. 520; *Lynch v. Hancock*, 14 S. C. 66; *Eddy v. Traver*, 6 Paige (N. Y.), 521; *Gerber v. Sharp*, 72 Ind. 553; *Jones v. Tinscher*, 15 Ind. 308; *Dick v. Moon*, 26 Minn. 309; *National Bank of Royalton v. Cushing*, 53 Vt. 321.

¹ *Conwell v. McCowan*, 81 Ill. 285; *Hardin v. Eames*, 5 Bradw. (Ill.) 153.

² *Curtis v. Tyler*, 9 Paige (N. Y.), 432; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797. As to the right of a co-surety to the benefit of the security, see *Hall v. Cushman*, 16 N. H. 462; *Low v. Smart*, 5 Ib. 353.

³ *Eastman v. Foster*, 8 Met. (Mass.) 19; *Graydon v. Church*, 7 Mich. 36.

⁴ *Lynch v. Hancock*, 14 S. C. 66.

⁵ *Baker v. Terrell*, 8 Minn. 195; *Riak v. Hoffman*, 69 Ind. 137.

⁶ *Johnson v. Zink*, 52 Barb. (N. Y.) 396.

⁷ *Dye v. Mann*, 10 Mich. 291.

effect that while the surety, upon paying the debt of his principal, is entitled to the full benefit of all *collateral* securities which the creditor has taken for the payment of the debt, yet he is not entitled to stand in the creditor's place as to the debt itself.

"It is a general rule," says Lord Eldon,¹ "that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal, but then the nature of those securities must be considered: when there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond that the debt was extinguished; the general rule, therefore, must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor; in the case for instance where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor."

But if the debt in the above case had been paid, not by the surety bound in the same obligation with the principal, but by a third party, who had, by a separate instrument, made himself liable for the same debt, it is clear that the reason upon which the decision rested would have failed altogether; the surety would then be entitled to stand in the shoes of the creditor in regard to the original debt as well as in regard to the security,² for the original debt is not in that case paid.

As already intimated, the distinction above taken is not generally maintained by the cases in this country. The doctrine of the cases here is, that upon the payment of a debt by the surety, he is entitled not only to the benefit of the collateral security but also to the benefit of the debt as represented by a bond or note, and to an assignment of that as well as of the mortgage, if an as-

¹ See *Copis v. Middleton*, T. & R. 224, 229. See, also, 1 Story's Eq. §§ 499, 499 b; *Hodgson v. Shaw*, 3 Myl. & K. 183, 190; *Craythorne v. Swinburne*, 14 Ves. 160.

In *Hodgson v. Shaw*, *supra*, the Chancellor, Lord Brougham, said: "The principles upon which *Copis v. Middleton* rests are sound and unquestionable; and it is

only upon a narrow and superficial view of the subject that the decision has ever been charged with refinement or subtlety. The ground of the determination was clear: it was founded in the known rules of law, and determined in strict conformity with the doctrines of this court."

² *Hodgson v. Shaw*, 3 Myl. & K. 183, 193.

signment is necessary in order to give him the full benefit of the same.¹

After a purchaser of a portion of the mortgaged estate has assumed the payment of the whole mortgage, a purchaser of another portion, upon being obliged for his own protection to pay it, is subrogated not only to the mortgagee's right against the land, but also to his right to hold the purchaser, who has assumed the debt, personally liable for the payment of it.²

883. The surety is entitled, upon paying the debt, to securities given by the debtor after the contract of suretyship as well as those given before or at the same time; and whether the surety knows of the existence of the securities is wholly immaterial.³ If he pays off part of the mortgage debt, he is entitled as against the mortgagor to charge upon the estate the amount he has so paid.⁴ He is entitled, too, not only to the equities which the creditor holds against the principal debtor, but also to those he has against all persons claiming under him.⁵

Moreover, the principal creditor is entitled to the full benefit of any mortgage security which the debtor has given to a surety. This right exists although the mortgage was given to the surety by the debtor after both had become bound to the creditor, and although there had been no previous agreement that indemnity should be given;⁶ and although the mortgage was executed without the knowledge of the creditor.⁷

884. When the creditor has made a further advance upon the mortgage. — But a surety is not entitled to an assignment from the creditor of a mortgage upon which the creditor has, after first taking it, made a further advance, unless he pays off such advance in addition to the original sum for which he became surety;⁸ and the mortgagee not being prevented from making the further advance, it is immaterial that the surety did not know of it, and it was not contemplated at the time of the original loan.⁹ But where there is a special contract on the part of the creditor that the securities given by the principal debtor shall be primarily liable, or that the surety may redeem upon paying a certain

¹ *Ellsworth v. Lockwood*, 42 N. Y. 89, 98, and cases cited.

² *Rardin v. Walpole*, 38 Ind. 146, and cases cited.

³ *Mayhew v. Crickett*, 2 Swanst. 185, 191; and see *Curtis v. Tyler*, 9 Paige (N. Y.), 432.

⁴ *Gedye v. Matson*, 25 Beav. 310.

⁵ *Drew v. Lockett*, 32 Beav. 499.

⁶ *Demott v. Stockton Paper Ware Manuf. Co.* 32 N. J. Eq. 124.

⁷ *McMullen v. Neal*, 60 Ala. 552.

⁸ *Williams v. Owen*, 13 Sim. 597.

⁹ *Ib.*

sum, the creditor cannot, as against him, make a further loan to the debtor, but must transfer the securities upon a tender from the surety of the amount of the original loan.¹

Where a loan of £5,000 was made in two distinct sums, one for £2,000 and one for £3,000, and distinct properties were mortgaged by separate deeds to secure these sums, for the payment of the former of which a third person also became surety, it was held that the creditor's right to retain all the securities until both sums were paid was superior to the right of the surety to have the benefit of the mortgage for that debt for which he was surety.²

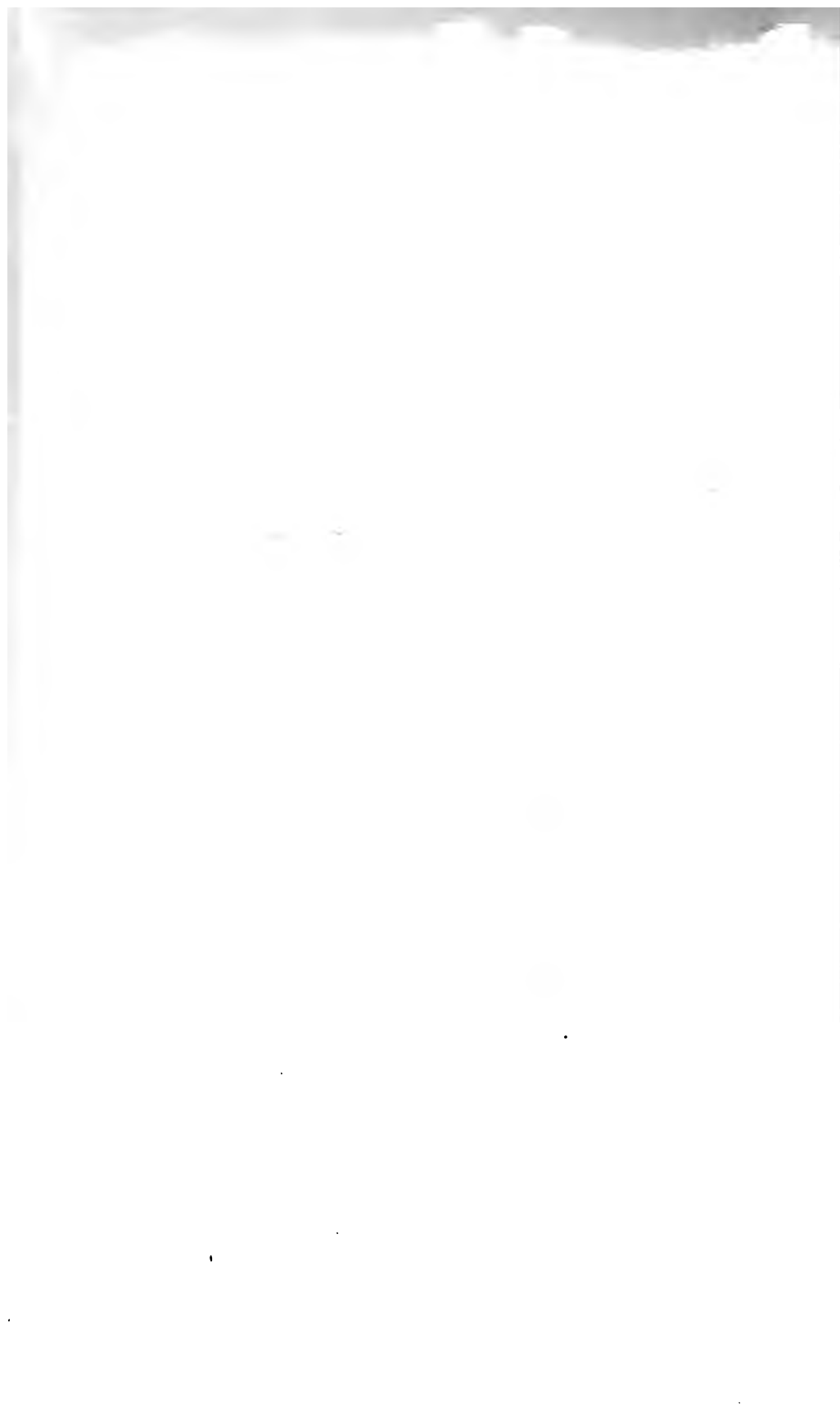
885. The right of subrogation is not lost by a renewal of the mortgage. When a junior incumbrancer pays off a prior incumbrance his right to be subrogated to the position of the prior mortgagee is not destroyed by reason of his taking from the mortgagor a new mortgage for the amount of both the mortgages, and although the new mortgage be void on account of usury. The mortgagee is equitably entitled to the same benefits of redemption that he would have had without such renewal of the mortgages with the mortgagor. By paying the prior mortgage debt he becomes entitled to a cession of the debt and a subrogation to all the rights of the mortgagee, and the mortgage, as against the mortgagor, is to be regarded as still existing and uncanceled. Only the subsequent mortgage is regarded as void under the usury laws.³

¹ *Bowker v. Bull*, 1 Sim. 29. In this case the debtor mortgaged his own property, and his daughters, to secure his debt, mortgaged their own estate; but the deed contained a proviso that the father's property should be primarily liable.

² *Farebrother v. Wodehouse*, 23 Beav. 18, 23.

³ *Patterson v. Birdsall*, 64 N. Y. 294; S. C. 6 Hun, 632; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602, 615; S. C. 11 Chicago L. N. 31.









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